17-224

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1041.

CHARLES F. KRING, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSOURI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED OCTOBER 11, 1882.

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a CHARLES F. KRING, PL'FF,
vs.
THE STATE OF MISSOURI, DEF'T. } Error.

In the Supreme Court of the United States, of the October term in the year of our Lord 1882.

Afterwards, to wit, on the 2d Monday of October, A. D. 1882, in the same term before the justices of the Supreme Court of the United States, at the Capitol at the city of Washington, comes the said Charles F. Kring, by L. D. Seward & P. N. Jones, his attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit: That on 19th day of March, A. D. 1875, he was, by a grand jury of St. Louis County and State of Missouri, indicted for murder of the first degree, and in the criminal court of said county and State tried and convicted as charged. That said cause was by appeal taken to the supreme court
b of the State and reversed and remanded; that after several mistrials, with the consent of the circuit attorney (the prosecuting officer of the State), and by leave of court, he withdrew his plea of not guilty of murder of the first degree previously pleaded by him and entered a plea of guilty of murder of the second degree, and was by the court sentenced to the penitentiary of the State for the period of twenty-five years and to pay the costs of the prosecution Nov. 11, 1877. That said cause was taken by appeal to the supreme court of the State of Missouri, and by said court reversed and remanded. That on the 10' day of May, A. D. 1881, against his objection put on trial for said offense charged in said indictment in said St. Louis criminal court, again put on trial for murder of the first degree and convicted as charged. That at the time said offense for which he was tried was alleged in said indictment was committed and at the time said indictment was presented
c the punishment under the laws of the State of Missouri for murder of the first degree was death, for murder of the second degree imprisonment only. That under the constitution and laws of Missouri as they stood at the time said offense was committed and at the time said indictment was presented, one convicted of murder of the second degree, or one who had pleaded guilty of murder of the second degree with consent of the circuit attorney and by leave of court on an indictment for murder of the first degree, could not afterwards be put on trial for murder of the first degree; that only by provisions of the constitution and laws of the State of Missouri passed and adopted since said offense was committed, and since said indictment was presented could one indicted and convicted as aforesaid of murder of the second degree on an
d indictment for murder of the first degree be put on trial and convicted of murder of the first degree in said State. That constitutional provisions and laws passed and adopted after said offense was committed, which said constitutional provisions and laws changed the punishment for said offens' were by said courts of the State of Missouri applied to said cause.

2d. That under the general laws of the State of Missouri one indicted for murder, on proper application and showing, is entitled a change of

venue on account of the prejudice of the vicinage. That he made an application for a change of venue under the general laws of said State at the proper time in the proper form and made proper showing, but said application was denied on account of a special law applicable to the county of St. Louis only. And the said Charles F. Kring prays that said judgment be reversed and for naught held.

L. D. SEWARD &
P. N. JONES,
Atty's for Pl'ff.

e The United States of America to the State of Missouri, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Missouri, wherein Charles F. Kring is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable Samuel F. Miller, associate justice of the Supreme Court of the United States, this 9th day February, in the year of our Lord one thousand eight hundred and eighty-two.

SAM. F. MILLER,
Associate Justice Supreme Court of the United States.

f (Indorsed:) United States court, district of Missouri. State of Mo., resp., vs. Chas. F. Kring. Citation. Filed Feb'y 13th, 1882. Henry W. Ewing, clerk.

Received a true copy of the within citation this 13th day of February, A. D. 1882.

THO. T. CRITTENDEN, *Gov.*

Rece'd a true copy of the within citation this 13th day of February, A. D. 1882.

D. H. McINTYRE,
Att'y Gen'l of the State Missouri.

g Supreme court, Missouri.

CITY OF JEFFERSON, , 187 .

STATE OF MISSOURI,
City of Jefferson, ss:

T. M. Winston, marshal of the supreme court of the State of Missouri, first being duly sworn, says that he served the within citation by delivering to Thos. T. Crittenden, gov. of Missouri, and D. H. McIntyre, att'y general of the State of Missouri, each, a true copy of said citation, this 18th day of February, A. D. 1882.

T. M. WINSTON.

Subscribed and sworn to before me this 13th day of February, A. D. 1882.

HENRY W. EWING,
Clk Sup. C't Mo.
By W. K. BRADBURY,
Dep't Clk.

h UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Missouri, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The State of Missouri, plaintiff, and against Charles F. Kring, defendant, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution or statute, a manifest error hath happened, to the great damage of the said defendant, Charles F. Kring, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this ninth day of February, in the year of our Lord one thousand eight hundred and eighty-two.

Issued at office in the city of Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[SEAL.]

M. M. PRICE,
Clerk of said Circuit Court,
By A. P. SELBY,
Deputy.

Allowed by—

SAM. F. MILLER,
Associate Justice Sup. Court U. S.

To operate as a supersedeas.

SAM. F. MILLER.

(Indorsed:) State of Mo., resp., vs. Chas. F. Kring, app. Writ of error. Filed Feb'y 13th, 1882. Henry W. Ewing, clerk.

i STATE OF MISSOURI, *ss:*

I, Henry W. Ewing, clerk of the supreme court of the State of Missouri, in obedience to the mandate of the within writ herewith transmitted to the honorable Supreme Court of the United States at Washington a full, true, and complete transcript of the record and proceedings in the within entitled cause as fully as the same remain of record and on file in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court at office in the city of Jefferson, this 2nd day of August, A. D. 1882.

[SEAL.] HENRY W. EWING, *Clk*,
By E. B. EWING, *D. C.*

j STATE OF MISSOURI, *ss:*

Be it remembered that heretofore, to wit, on the 28th day of November, A. D. 1881, a transcript was filed in the office of the clerk of the supreme court of the State of Missouri, which is in the words and figures following, to wit:

1 STATE OF MISSOURI, *ss:*

Be it remembered that heretofore, to wit, on the second day of July, A. D. 1881, there was filed in the office of the clerk of the St. Louis court of appeals a transcript of the record and proceedings in a certain cause lately pending in the St. Louis criminal court, which transcript is in the words and figures following, to wit:

STATE OF MISSOURI,
County of St. Louis, sct.:

At a term of the St. Louis criminal court, begun and held at the city of St. Louis, within and for the county of St. Louis, on the first Monday in March, the same being the first day of said month in the year of our Lord one thousand eight hundred and seventy-five, there were present the honorable William C. Jones, judge; J. C. Normile, esquire, circuit attorney of the eight' judicial circuit; Lewis B. Beach, esquire, assistant circuit attorney; John A. Watson, esquire, marshal*l* of the county of St. Louis, and Andrew J. Clabby, clerk of said court.

At which term of said court the following, among other proceedings were had, to wit:

MONDAY, *March* 1*st*, 1875.

2 The marshal*l* of the county of St. Louis makes return to the court of the names of the persons by him summoned to answer and serve as grand jurors during the present term thereof; and who being called come as follows: Ellis N. Leeds, who is by the court appointed foreman; John H. Singleton, George W. Sanders, Ernest Linz, D. M. Frost, Charles Kimismuller, Thomas Howard, C. A. Stifel, Charles McLaren, James Luthy, Silas Adkins, Timothy O'Brien, Charles L. Hunt, J. D. Maguire, Joseph Cook, James Ward, and B. C. Powell; seventeen good and lawful men, who being duly sworn as grand jurors, and having received the'*re* charge from the court, retire to consider of their presentments and of such business as may come before them.

FRIDAY, *March 19th*, 1875.

On this day the grand jury return to the bar, and through their foreman deliver the following indictment as a true bill, to wit:

Indictment.

STATE OF MISSOURI, *County of St. Louis, ss:*

St. Louis criminal court, March term, 1875.

The grand jurors of the State of Missouri, within and for the body of the county of St. Louis, now here in court, duly empanelled, sworne
3 and charged upon their oath, present that Charles F. Kring, late of St. Louis, in the county of St. Louis aforesaid, on the fourth day of January, in the year of our Lord one thousand eight hundred and seventy-five, at St. Louis, in the county of St. Louis aforesaid, with force and arms in and upon one Dora C. Broemser, in the peace of the State, then and there being, feloniously, wilfully, deliberately, premeditatedly, and of his malice aforethought, did make an assault; and that the said Charles F. Kring, with a certain pistol, then and there charged with gunpowder and several leaden bullets, then and there feloneously, wilfully, deliberately, premeditatedly, and of his malice aforethought, did discharge and shoot off, to, at, against, and upon the said Dora C. Broemser, and that the said Charles F. Kring, with the leaden bullets aforesaid, out of the pistol aforesaid, then and there by the force of the gunpowder aforesaid, by the said Charles F. Kring discharged and shot off as aforesaid, then and there feloneously, deliberately, premeditatedly, and of his malice aforethought, did strike, penetrate, and wound the said Dora C. Broemser in and upon the left thigh, and in and upon the left side of the back of her, the said Dora C. Broemser, giving to the said Dora C. Broemser, then and there with the leaden bullets aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid, by the said Charles F. Kring, in and upon the left thigh
4 and in and upon the left side of the back of the said Dora C. Broemser, two mortal wounds, each of the depth of six inches, and of the breadth of half an inch, of which said mortal wound the said Dora C. Broemser, from the said fourth day of January, in the year aforesaid, to the sixteenth day of January, in the year aforesaid, at St. Louis aforesaid, in the county aforesaid, did languish, and languishing did live; on which said sixteenth day of January aforesaid, in the year aforesaid, at St. Louis aforesaid, in the county aforesaid, the said Dora C. Bromser, of the said mortal wounds, died.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Charles F. Kring, the said Dora C. Broemser, in the manner and form, and by the means aforesaid, feloneously, wilfully, deliberately, premeditatedly, and of his malice aforethought, did kill and murder, against the peace and dignity of the State.

LEWIS B. BEACH,
Assistant Circuit Att'y.

(Endorsed:) A true bill.

E. N. LEEDS,
Foreman.

Witnesses: Dr. G. F. Dudley, Dr. H. A. Buck, John G. Broemser, Amanda W. Broemser, Karl Haase, Capt. Tom O'Neill, Officer Newman, Sergt. Jenks, Dr. W. S. Barker.

5 Filed March 19th, 1875. Andrew J. Clabby, clerk of St. Louis criminal court.

Arreignment.

SATURDAY, *March* 20*th*, 1875.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder; first degree.

The defendant, being in custody, is this day brought into court by the marshal. Thereupon, on motion of the circuit attorney, the defendant is arraigned upon said indictment, and the same having been read to him, says he is not guilty as herein charged, and for trial puts himself upon the country, and the circuit attorney does the same.

MONDAY, *April* 19*th*, 1875.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

On motion of defendant's attorney this cause is continued for defendant to take depositions in Germany.

And at the May term, 1875, of said court, the following proceedings were had, to wit:

MONDAY, *May* 24*th*, 1875.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

It is ordered that this cause be continued for defendant, because of absent witnesses.

6 And at the July term, 1875, of said court, the following proceedings were had, to wit:

TUESDAY, *July* 13, 1875.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

It is ordered that this cause be continued for defendant, as on affidavit, because of absent witnesses.

And at the September term, 1875, of said court, the following proceedings were had, to wit:

MONDAY, *September* 20*th*, 1875.

STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

It is ordered that this cause be continued for defendant on affidavit.

And at the November term, 1875, of said court, the following proceedings were had, to wit:

MONDAY, *December* 20*th*, 1875.

THE STATE OF MISSOURI, PLAINTIFF,
vs.
CHARLES F. KRING, DEFENDANT. } 43. Indictment for murder; first degree.

This day comes the circuit attorney, who represents the State,
7 and also Messrs. R. A. McDonald, Turner & Jones, attorneys for defendant, come, and the defendant, who being in custody, is brought into court by the marshal*l*. Thereupon the court proceeded to the selection of a jury in the case, and, having selected a jury, it is ordered that they come, to wit: J. P. Clifford, T. P. Riddle, W. J. Fox, William Robinson, John Roby, Ferdinand Kreff, J. W. Smith, Jesse Gray, A. L. Mitchell, John Letcher, William Hamilton, and John Darby, twelve good and lawful men, who being duly elected and tried and sworn the issues herein between The State of Missouri, plaintiff, and Charles F. Kring, defendant, well and truly to try and a true verdict render according to the evidence:

Thereupon the trial of this cause proceeded, and the testimony on the part of the State partly heard, whereupon the court adjourned until to-morrow morning at ten o'clock.

TUESDAY, *December* 1*st*, 1875.

THE STATE OF MISSOURI, PLAINTIFF,
vs.
CHARLES F. KRING, DEFENDANT. } 43. Indictment for murder; 1st degree.

This day again comes the circuit attorney, who represents the State, also come the attorneys for the defendant, and the defendant, who is
8 brought into court in the custody of the marshal*l*, and the jurors aforesaid also come. Thereupon the trial of this cause is further progressed, and the testimony of the witnesses for the State is further heard and not being concluded at the hour of adjournment, further proceedings are deferred until to-morrow morning at ten o'clock.

WEDNESDAY, *December* 22*d*, 1875.

THE STATE OF MISSOURI, PLAINTIFF, *vs.* CHARLES F. KRING, DEFENDANT. } Indictment for murder; 1st degree.

This day again comes the circuit attorney who represents the State, also come the attorneys of the defendant, and the defendant, who is brought into court in the custody of the marshall, and the jurors aforesaid also come. Thereupon the trial of this cause was again resumed and the testimony of the witnesses for the State being heard and concluded, the testimony of the witnesses for the defendant is partly heard. Further proceedings are deferred until to-morrow morning at ten o'clock.

THURSDAY, *December* 23*d*, 1875.

THE STATE OF MISSOURI, PLAINTIFF, *vs.* CHARLES F. KRING, DEFENDANT. } 43. Indictment for murder; 1st degree.

This day again come the circuit attorney who represents the
9 State, and also come the attorneys of the defendant, and the defendant, who is brought into court by the marshal*l*, and the jurors aforesaid also come. Thereupon the trial of this cause further proceeded, and the testimony of the witnesses for the defence having been heard and concluded, as also the rebuttal testimony for the State being heard and concluded, further proceedings are deferred until to-morrow morning at ten o'clock.

FRIDAY, *December* 24*th*, 1875.

THE STATE OF MISSOURI, PLAINTIFF, *vs.* CHARLES F. KRING, DEFENDANT. } 43. Indictment for murder; 1st degree.

This day again come the circuit attorney, who represents the State, and also come the attorneys for the defendant; and the defendant, who is brought into court in the custody of the marshal*l*, and the jurors aforesaid also come. Thereupon the trial of this cause further proceeded, and the arguments of counsel having been heard and concluded, and the jury having received their instructions from the court, the cause is submitted to them for their verdict on the premises, who retire to consider thereof.

SATURDAY, *December* 25*th*, 1875.

THE STATE OF MISSOURI, PLAINTIFF, *vs.* CHARLES F. KRING, DEFENDANT. } 43. Indictment for murder; 1st degree.

10 This day again come the circuit attorney, who represents the State, and the defendant, who is brought into court in the custody of the marshal, and the attorneys of defendant also come; also come the jurors aforesaid, and being agreed upon their said verdict, say as follows:

Verdict.

"We, the jury, find the defendant guilty of murder in the first degree as charged in the indictment.

"WILLIAM HAMILTON,
"*Foreman.*"

Whereupon the defendant, by his attorneys, files a motion herein for a new trial.

And at the January term, 1876, of said court, the following proceedings were had, to wit:

SATURDAY, *January 22d*, 1876.

THE STATE OF MISSOURI, PLAINTIFF, *vs.* CHARLES F. KRING, DEFENDANT. } 43. Indictment for murder; 1st degree.

This day come the circuit attorney, who represents the State, and the defendant, who being in custody, is brought into court by the marshal*l*, and the attorney of defendant also comes.

And the motion for a new trial herein before filed is by them argued and submitted, and the court not being thereof fully advised, doth take the motion under advisement.

11 SATURDAY, *February 5th*, 1875.

THE STATE OF MISSOURI, PLAINTIFF, *vs.* CHARLES F. KRING, DEFENDANT. } 43. Indictment for murder; 1st degree.

This day come the circuit attorney, who represents the State, and the defendant, who, being in custody, is brought into court by the marshal*l*, and the attorney of the defendant also comes.

And the motion for a new trial hereinbefore filed having before been argued and submitted to the court, and the court having considered said motion, and being thereof fully advised, doth overrule the same. Thereupon said defendant is demanded by the court if he hath or knoweth anything to say why the court should not now proceed to pass sentence of death upon him in accordance with the verdict rendered against him; and having nothing to say except that which he hath before said: therefore it considered by the court that said defendant, Charles F. Kring, be taken from this court to the place from whence he came, there to remain until Friday, the 24th day of March next; thence, on that day, to be taken to the place of execution, and there, between the hours of six o'clock and nine o'clock on the forenoon of said day, he be hanged by the neck until he be dead.

12 And it is ordered by the court that the clerk of this court make out a warrant commanding the marshal*l* of St. Louis County to carry this judgment and sentence into execution. Thereupon the defendant prays an appeal to the court of appeals from said judgment, and the court doth grant said appeal.

FRIDAY, *February 25th*, 1876.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

This day comes the defendant, by his attorney, and files his bill of exceptions herein.

And at the March term, 1876, of said court the following proceedings were had, to wit:

TUESDAY, *March 21st*, 1876.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

Mandate of the St. Louis court of appeals filed, remanding—

THURSDAY, *March 23d*.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

13 Appeal from the court of appeals to supreme court filed.

And at the October term, 1877, of said court the following proceedings were had, to wit:

MONDAY, *October 1st*, 1877.

THE STATE OF MISSOURI, PLAINTIFF,
vs.
CHARLES F. KRING, DEFENDANT. } 43. Indictment for murder.

This day the mandate of the supreme court of the State is filed, reversing and remanding this cause.

WEDNESDAY, *October 31st*, 1877.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

It is ordered that this cause be continued for want of time to try same.

And at the November term, 1877, of said court the following proceedings were had, to wit:

MONDAY, *December* 10*th*, 1877.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

It is ordered this cause be continued for the defendant.

And at the January term, 1878, of said court the following proceedings were had, to wit:

FRIDAY, *January* 18*th*, 1878.

14 THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

Depositions for the defendant opened and filed.

WEDNESDAY, *January* 23*d*, 1878.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

Depositions for defendant filed.

WEDNESDAY, *January* 30*th*, 1878.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

It is ordered that this cause be continued for the defendant because of absent witnesses.

And at the March term, 1878, of said court the following proceedings were had, to wit:

WEDNESDAY, *March* 27*th*, 1878.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

It is ordered that this cause be continued for the defendant upon affidavit.

WEDNESDAY, *May* 1*st*, 1878.

15 THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

Depositions for defendant this day filed.

And at the May term, 1878, of said court the following proceedings were had, to wit:

SATURDAY, *May* 18*th*, 1878.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

Depositions for defendant filed.

TUESDAY, *May* 21*st*, 1878.

THE STATE OF MISSOURI, PLAINTIFF,
vs.
CHARLES F. KRING, RESPONDENT. } 43. Indictment for murder.

This come the circuit attorney, who represents the State, and the defendant, who, being in custody, is brought into court by the marshal*l*, and the attorney of defendant also comes, and both parties being ready for trial, it is ordered that a jury come. Thereupon came a jury, to wit: J. E. Crawford, A. W. Evans, Jos. W. Harrington, William Golding, H. L. Hill, L. R. Wilson, Jno. Behrens, jr., W. Helm, James Kay, John Ward, H. C. Rolfing, and John Barker, twelve good and lawful
16 men, who, being duly elected and tried and sworn, the issues herein between The State of Missouri, plaintiff, and Charles F. Kring, defendant, well and truly to try and a true verdict render according to the evidence. Whereupon the trial of this cause proceeds, and the testimony of the witnesses being partly heard but not concluded at the hour of adjournment, further proceedings are deferred until to-morrow morning.

WEDNESDAY, *May* 22*d*, 1878.

THE STATE OF MISSOURI, PLAINTIFF,
vs.
CHARLES F. KRING, DEFENDANT. } 43. Indictment for murder.

This day again come the circuit attorney who represents the State, and the defendant, being in custody, is brought into the court by the marshal*l*, and the attorney of defendant also comes, and the jurors aforesaid also come; and thereupon the trial of this cause proceeded, and the testimony of the witnesses being still further heard but not being concluded at the hour of adjournment, further proceedings are deffer'ed until to-morrow morning.

THURSDAY, *May* 23*d*, 1878.

THE STATE OF MISSOURI, PLAINTIFF,
vs.
CHARLES F. KRING, DEFENDANT. } 43. Indictment for murder.

This day again come the circuit attorney who represents the
17 State, and the defendant, being in custody, is brought into court

by the marshal*l*, and the attorney of the defendant also comes and the jurors aforesaid also come. Thereupon the trial of this cause proceeded, and the testimony of the witnesses is still further heard, but not being concluded at the hour of adjournment, further proceedings are deferred until to-morrow morning.

FRIDAY, *May* 24*th*, 1878.

THE STATE OF MISSOURI, PLAINTIFF,
vs.
CHARLES F. KRING, DEFENDANT. } 43. Indictment for murder.

This day again come the circuit attorney who represents the State, and the defendant, being in custody, is brought into court by the marshal*l*, and the attorney of defendant also comes, and the jurors aforesaid also come. Thereupon the trial of this cause proceeded and the testimony of the witnesses being still further heard, but not concluded at the hour of adjournment, further proceedings are deferred until to-morrow morning.

SATURDAY, *May* 25*th*, 1878.

THE STATE OF MISSOURI, PLAINTIFF,
vs.
CHARLES F. KRING, DEFENDANT. } 43. Indictment for murder.

This day again come the circuit attorney who represents the State, and the defendant, who, being in custody, is brought into
18 court by the marshal*l*, and the attorney of defendant also comes, also come the jurors aforesaid. Thereupon the trial of this cause proceeded, and the testimony of witnesses being still further heard, and the same being concluded thereupon, the jury having received their instructions from the court, the argument of the counsel is partly heard on the part of the defense, when further proceedings are defer'ed until Monday morning.

MONDAY, *May* 27*th*, 1878.

THE STATE OF MISSOURI, PLAINTIFF,
vs.
CHARLES F. KRING, DEFENDANT. } 43. Indictment for murder.

On this day again come the circuit attorney who represents the State, and the defendant, who, being in custody, is brought into court by the marshal*l*, and the attorney of defendant also comes, also come the jurors aforesaid with the exception of A. W. Evans, and it being shown to the court that the said juror, A. W. Evans, is sick and confined to his bed, and the being satisfied from the statement of Dr. G. H. Bond, the physician attending said Evans, that said juror, A. W. Evans', condition is such that it is impossible for him to serve longer as a juror, and
19 the defendant, by his attorney, Robert S. McDonald, consenting hereto, the court doth order and direct that the said jury be discharged from consideration of the cause, and that the cause be continued until the next term of the court.

And at the July term, 1878, of said court, the following proceedings were, had to wit:

THURSDAY, *July* 11*th*, 1878.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

It is ordered that this cause be continued, both parties consenting thereto.

And at the October term, 1878, of said court the following proceedings were had:

TUESDAY, *October* 22d, 1878.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

It is ordered that this cause be continued for defendant.

And at the November term, 1878, of said court the following proceedings were had, to wit:

MONDAY, *December* 16*th*, 1878.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

20 It is ordered that this cause be continued for defendant upon affidavit.

And at the January term, 1879, of said court the following proceedings were had, to wit:

TUESDAY, *January* 14*th*, 1879.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

Depositions for defendant this day filed. The attorney for the defendant files a motion for the State to furnish to the defendant a list of witnesses expected to be used by the State, and said motion is by consent of the circuit attorney sustained.

MONDAY, *January* 20*th*, 1879.

THE STATE OF MISSOURI, PLAINTIFF,
vs.
CHARLES F. KRING, DEFENDANT. } 43. On indictment for murder.

This day comes the circuit attorney, who represents the State, and the

defendant, who, being in custody, is brought into court by the marshal, and the attorneys of defendant also come, and both parties being ready for trial, it is ordered that a jury come. Thereupon come a jury, to wit: John F. Bolland, Dennis Daly, Ed. L. Smith, John Stachle, J. H. Sullivan, Thomas Donahue, Owen Jones, Mathew Leahy, A. Barnberger,
Wm. A. J. Shaw, Thomas Fogarty, and Eugene McGrath, twelve
21 good and lawful men, who being duly elected and tried and sworn, the issues herein between The State of Missouri, plaintiff, and Charles F. Kring, defendant, well and truly to try and a true verdict render according to the evidence. Thereupon the trial of this cause proceeded, and the testimony of the witnesses is partly heard, but not being concluded at the hour of adjournment, further proceedings herein are deferred until to-morrow morning.

TUESDAY, *January* 21*st*, 1879.

THE STATE OF MISSOURI, PLAINTIFF,
vs. } 43.
CHARLES F. KRING, DEFNDATN.

This day again come the circuit attorney, who represents the State, and the defendant, who, being in custody, is brought into court by the marshal, and the attorneys of defendant also come, also come the jurors aforesaid. Thereupon the trial of this cause proceeded, and the testimony of the witnesses is still further heard, but not being concluded at the hour of adjournment, further proceedings are deferred until to-morrow morning.

WEDNESDAY, *January* 22*d*, 1879.

THE STATE OF MISSOURI, PLAINTIFF,
vs. } 48. On indictment for murder.
CHARLES F. KRING, DEFENDANT.

This day again come the circuit attorney, who represents the
22 State, and the defendant, who, being in custody, is brought into court by the marshal, and the attorneys of defendant also come, also come the jurors aforesaid. Thereupon the trial of this cause proceeded, and the testimony of the witnesses is still further heard, but not being concluded at the hour of adjournment, further proceedings are deferred until to-morrow morning.

TUESDAY, *January* 23*d*, 1879.

THE STATE OF MISSOURI, PLAINTIFF,
vs. } 43. On indictment for murder.
CHARLES F. KRING, DEFENDANT.

This day again come the circuit attorney, who represents the State, and the defendant, who, being in custody, is brought into court by the marshal, and the attorneys of the defendant also come, also come the jurors aforesaid. Thereupon the trial of this cause proceeded, and the testimony of the witnesses is still further heard, but not concluded at the hour of adjournment. Further proceedings are deferred until to-morrow morning.

FRIDAY, *January 24th*, 1879.

THE STATE OF MISSOURI, PLAINTIFF,
vs.
CHARLES F. KRING, DEFENDANT. } 43. On indictment for murder.

This day again come the circuit attorney, who represents the State, and the defendant, who, being in custody, is brought into court by the
23 marshal*l*, and the attorneys of the defendant also come, also come the jurors aforesaid. Thereupon the trial of this cause proceeded, and the testimony of the witnesses being still further heard, and the same not being concluded, further proceedings are deferred until to-morrow morning.

SATURDAY, *January 25th*, 1879.

THE STATE OF MISSOURI, PLAINTIFF.
vs.
CHARLES F. KRING, DEFENDANT. } 43. On indictment for murder.

This day again come the circuit attorney, who represents the State, and the defendant, who, being in custody, is brought into court by the marshal*l*, and the attorneys of the defendant also come, also come the jurors aforesaid. Thereupon the trial of this cause proceeded, and the testimony of the witnesses being still further heard, and the same being concluded, thereupon further proceedings are deferred until Monday morning.

MONDAY, *January 27th*, 1879.

THE STATE OF MISSOURI, PLAINTIFF,
vs.
CHARLES F. KRING, DEFENDANT. } 43. On indictment for murder.

This day again come the circuit attorney, who represents the State, and the defendant, who, being in custody, is brought into court by the marshal*l*, and the attorneys of defendant also come, also come the
24 jurors aforesaid. Thereupon the argument of the counsel is heard, and the jury having received their instructions from the court, the case is submitted to them for their verdict in the premises, and retire to consider thereof.

TUESDAY, *January 28th*, 1879.

THE STATE OF MISSOURI, PLAINTIFF,
vs.
CHARLES F. KRING, DEFENDANT. } 43. On indictment for murder.

This day again come the circuit attorney, who represents the State, and the defendant, who, being in custody, is brought into court by the marshal*l*, and the attorneys of defendant also come, and the jurors aforesaid also come. Thereupon said jurors are given additional instructions by the court, and said jurors thereupon again retire to consider of their verdict in the premises.

WEDNESDAY, *January* 29*th*, 1879.

THE STATE OF MISSOURI, PLAINTIFF,
vs.
CHARLES F. KRING, DEFENDANT. } 43. On indictment for murder.

This day again come the circuit attorney, who represents the State, and the defendant, who, being in custody, is brought into court by the marshal, and the attorneys of the defendant also come, also come the jury aforesaid, and the said jury not being able to agree among themselves upon a verdict herein, it is ordered that said jurors be discharged from further consideration of said verdict, and that the cause be continued.

SATURDAY, *March* 1*st*, 1879.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

It is ordered that this cause be continued.

And at the March term, 1879, of said court the following proceedings were had, to wit:

MONDAY, *March* 31*st*, 1879.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

It is ordered that this cause be continued for defendant, as on affidavit.

WEDNESDAY, *April* 23*d*, 1879.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

In view of said Charles F. Kring's physical condition, as per written report of his physician, Dr. Louis A. Bauer, it is ordered that the jailors give said Kring the freedom of the jail to the fullest extent consistent with his safe custody.

MONDAY, *May* 26*th*, 1879.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

This day comes the defendant by his attorney and files a motion for a special *venire*.

SATURDAY, *May* 31*st*, 1879.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

The motion for a special *venire* is this day overruled.

MONDAY, *June* 2*d*, 1879.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

This day comes the circuit attorney and files a motions to suppress certain depositions, and also comes defendant by his attorneys and files a motion to suppress certain portions of depositions, and it is ordered by the court that this cause be continued for want of time to try the same.

SATURDAY, *June* 28*th*, 1879.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

This day the motions to suppress herein, Nos. 1, 2, and 3, are taken by the court as submitted and taken under advisement.

27 And at the July term, 1879, of said court, the following proceedings were had, to wit:

MONDAY, *July* 14*th*, 1879.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

Both parties consenting thereto, it is ordered that this cause be continued.

SATURDAY, *July* 19*th*, 1879.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

This day the court overrules the motion to suppress depositions herein filed, both of the State and defense. And at the October term, 1879, of said court, the following proceedings were had, to wit:

WEDNESDAY, *October* 22*d*, 1879.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

It is ordered that this cause be continued for want of time to try the same, and case ordered specially set for November 11th, 1879.

FRIDAY, *October* 24*th*, 1879.

THE STATE OF MISSOURI } 43. Murder.
vs.
CHARLES F. KRING. }

This day comes the defendant, by his attorney, and prays that a commission for the taking of depositions of witnesses in Illinois be issued.
28 Affidavit and interrogatories being filed, it is ordered that a dedimus issue.

And at the November term, 1879, of said court the following proceedings were had, to wit:

TUESDAY, *November* 4*th*, 1879.

THE STATE OF MISSOURI } 43. Murder.
vs.
CHARLES F. KRING. }

This day defendant, by his attorney, files his motion to strike out certain portions of the depositions herein.

THURSDAY *November* 6*th*, 1879.

THE STATE OF MISSOURI } 43. Murder.
vs.
CHARLES F. KRING. }

The motion to suppress depositions herein is taken by the court as submitted, and is by the court taken under advisement.

TUESDAY, *November* 11*th*, 1879.

THE STATE OF MISSOURI } 43. Murder.
vs.
CHARLES F. KRING. }

The motion to suppress certain portions of the depositions hereinbefore filed, and by the court taken under advisement, is by leave of the court withdrawn.

WEDNESDAY, *November* 12*th*, 1879.

THE STATE OF MISSOURI, PLAINTIFF, } 43. On indictment for murder; 1st degree.
vs.
CHARLES F. KRING, DEFENDANT. }

29 This day the defendant, being in custody, is brought into court by the sheriff. Thereupon said defendant, by consent of the circuit attorney and leave of the court, withdraws his plea of not guilty by him heretofore pleaded to said indictment and says that he is guilty of murder in the second degree, and submits his sentence to the court.

Sentence.

It is therefore considered by the court that the said defendant, Charles F. Kring, for this offence of murder in the second degree, and in pursuance

of his plea of guilty thereto, be imprisoned in the penitentiary of this State for the term of twenty-five years; that he pay the costs of this prosecution, and stand committed until this sentence be complied with.

THURSDAY, *November* 13*th*, 1879.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

This comes the defendant, by his attorney, and files his motion for further time to make and perfect his objection to the sentence heretofore passed on said defendant.

SATURDAY, *November* 15*th*, 1879.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

This day comes the defendant, by his attorney, and files his motion to set aside the judgment and sentence herein.

MONDAY, *November* 24*th*, 1879.

30 THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

This day comes the defendant, by his attorney, and files affidavits in support of his motion to set aside the sentence and judgment herein.

FRIDAY, *December* 5*th*, 1879.

THE STATE OF MISSOURI, PLAINTIFF,
vs.
CHARLES F. KRING, DEFENDANT. } 43. On indictment for murder; first degree.

This day the defendant, being in custody, is brought into court by the sheriff, and the attorney of said defendant also comes; thereupon the motion to set aside the judgment hereinbefore rendered is argued and submitted to the court, and the court, not being thereof fully advised, doth take the same under advisement.

THURSDAY, *December* 18*th*, 1879.

THE STATE OF MISSOURI, PLAINTIFF,
vs.
CHARLES F. KRING, DEFENDANT. } 43. On indictment for murder; first degree.

This day, the court having considered the motion to set aside the judgment and sentence herein, and being thereof now fully advised, doth overrule the same. Thereupon the defendant, by his attorney, files his motion and affidavit for an appeal herein.

31 SATURDAY, *January 3d*, 1—.

THE STATE OF MISSOURI, PLAINTIFF,
vs.
CHARLES F. KRING, DEFENDANT. } 43. On indictment for murder; 1st degree.

This day comes the defendant, by his attorney, and files his bill of exceptions herein. Whereupon defendant prays an appeal to the St. Louis court of appeals from the judgment herein rendered against him, and the court doth grant said appeal. Thereupon defendant files a motion for a supersedeas herein, and the same is ordered continued.

And at the January term, 1880, of said court the following proceedings were had, to wit:

FRIDAY, *January 16th*, 1880.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

This day the motion for a supersede' herein is argued and submitted to the court and by the court taken under advisement.

And at the March term, 1880, of said court the following proceedings were had, to wit:

MONDAY, *March 1st*, 1880.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder. Supersedeas.

The court having considered the motion for a supersedeas herein,
32 and being thereof now fully advised, doth overrule the same, but allows the defendant ten days' time to apply to the court of appeals for said supersedeas.

TUESDAY, *March 2d*, 1880.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

On motion of defendant's attorney it is ordered that the ten days heretofore allowed defendant to apply to court of appeals for supersedeas be extended to thirty days.

TUESDAY, *March 23d*, 1880.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

Copy of the order of supreme court granting a supersedeas herein until the cause could be heard by the supreme court this day filed.

And at May term, 1880, of said court the following proceedings were had, to wit:

FRIDAY, *June 25th*, 1880.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

Mandate of the supreme court and remanding this case this day filed.

FRIDAY, *July 2d*, 1880.

THE STATE OF MISSOURI
vs.
33 CHARLES F. KRING. } 43. Murder.

This day the court takes the motion to set aside the judgment herein and permit defendant to withdraw his plea of guilty and enter a plea of not guilty as submitted, and takes the same under advisement, and orders that the same be continued until the next term.

And at the July term, 1880, of said court the following proceedings were had to wit:

TUESDAY, *July 6th*, 1880.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

This day the court sustains the motion to set aside the judgment herein, and to permit the defendant to withdraw his plea of guilty of murder in the second degree and enter a plea of not guilty to the indictment, and the court orders the case set for trial on September 13th, 1880.

MONDAY, *July 12th*, 1880.

THE STATE OF MISSOURI, PLAINTIFF,
vs.
CHARLES F. KRING, DEFENDANT } 43. On indictment for murder; 1st degree.

This day, the defendant, being in custody, is brought into court by the sheriff, and the attorneys of defendant also come; thereupon defendant is demanded by the court if he desires to withdraw his plea of guilty of murder of the second degree and enter a plea of not guilty to the in-
34 dictment herein, and defendant refusing to answer whether he does or not desire so to do, it is ordered by the court that defendant's plea of guilty of murder of the second degree herein be set aside and held for naught, in accordance with defendant's motion to set aside the judgment herein and permit him to withdraw his plea of guilty of murder of the second degree and enter a plea of not guilty to the indictment heretofore sustained by the court, and thereupon, on motion of the circuit attor-

ney, the defendant is arraigned upon said indictment, and the same being read to him, and he refusing to plead thereto, it is ordered by the court that a plea of not guilty be entered herein, and, parties consenting thereto, it is ordered that this cause be continued.

And at the October term, 1880, of said court the following proceedings were had, to wit:

FRIDAY, *October* 2*d*, 1880.

THE STATE OF MISSOURI, PLAINTIFF,
vs.
CHARLES F. KRING, DEFENDANT. } 43. On indictment for murder.

The following agreement between the State and the defendant is this day filed, to wit:

STATE OF MISSOURI
vs.
CHARLES F. KRING. } Murder.

It is agreed by the above-named parties that the defendant shall have leave to file his bill of exceptions taken in this case at the next
35 term of this court. This arrangement is made between the parties now because of the absence of the circuit attorney, J. C. Normile, he being absent from the city of St. Louis.

(Signed) G. S. VAN WAGNER,
Att'y of Def't.

(Signed) E. A. NOONAN,
Assistant Circuit Att'y.

MONDAY, *October* 18*th*, 1880.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

Parties consenting thereto, it is ordered that this cause be continued, and that this case be set specially for trial on December 6th, 1880 *for trial.*

FRIDAY, *October* 29*th*, 1880.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

Now on this day comes G. S. Van Wagner, and by leave of court withdraws as attorney for said Charles F. Kring.

FRIDAY, *October* 29*th*, 1880.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

This day comes the defendant, by his attorney, and files his bill of exceptions herein, which is as follows:

Bill of exceptions.

STATE OF MISSOURI } Murder in 1st degree.
vs.
CHARLES F. KRING. }

In the St. Louis criminal court, city of St. Louis, Missouri, May term, 1880.

Be it remembered that on 25th day of June, 1880, the following proceedings were had in this cause: The circuit attorney filed the
36 mandate of the supreme court, as follows, to wit:

Supreme Court of Missouri, April term, 1880.

THE STATE OF MISSOURI, RESPONDENT, } Appeal from St. Louis court of appeals.
vs.
CHARLES F. KRING, APPELLANT. }

Now at this day again come the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concer'ing the premises, do consider and adjudge that the judgments aforesaid, in form aforesaid, by the said St. Louis court of appeals and St. Louis criminal court rendered, be reversed, annulled, and for naught held and esteemed, and that the said appellant be restored to all things which he has lost by reason of said judgment.

Remanded.

It is further considered and adjudged by the court the' the said cause be remanded to the St. Louis criminal court for further proceedings to be had therein in conformity with the opinion of this court herein delivered, and that the said appellant recover against the said respondent costs and charges herein expended.

(Opinion filed.)

STATE OF MISSOURI, *sct:*

I, Henry W. Ewing, clerk of the supreme court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of
37 the judgment of said supreme court entered of record at the April term thereof, 1880, and on 14th day of June, 1880, in the above-entitled cause. Given under my hand, and seal of said court at the city of Jefferson, this 21st day of June, 1880.

[SEAL.] HENRY W. EWING, *Clerk*,
By CHAS. G. GEUTHER, *D. C.*

Whereupon the court asked the defendant, who was then present, "Do you desire to withdraw your plea of guilty of murder in the second degree, and re-enter your plea of not guilty of murder in the first degree?" The defendant then and there said "No, sir; I desire to withdraw no plea. I stand by the agreement made between the circuit attorney, Mr. La Duc, and myself." Mr. McDonald, of cou'sel for defendant, said, "As it is

entered in the record in this case." The court then said, "The position you take is that the agreement is valid, and that the court is bound to carry it out?" Mr. McDonald replied, "Yes, sir." Then Mr. Van Wagner, also of counsel for defendant, stated that he, the defendant, "desired to stand by the plea of guilty to murder in the second degree in order that the court might meet out sentence." The court then said: "Gentlemen, what do you wish to do with this motion and these affidavits?" Mr. Van Wagner replied that he did not think that the motion and affidavits referred to by the court cut any figure in the case just now; that the motion and affidavits had subserved their purpose. Mr. McDonald
38 made a verbal motion to sentence the defendant under his plea of guilty of murder in the second degree in accordance with the agreement made with the circuit attorney. The court said: "Put it in writing." Then Mr. McDonald said, "I will make a verbal suggestion that the court correct its sentence under the agreement."

Whereupon the court ordered the following motion to be put on the law docket:

Motion.

In the St. Louis criminal court.

STATE OF MISSOURI
vs.
CHARLES F. KRING.

And now comes the defendant, by his attorneys, and files this his motion to set aside the judgment and sentence of twenty-five years' imprisonment in the penitentiary rendered and adjudged against said defendant by the court, and to allow said defendant to withdraw the plea of guilty of murder in the second degree heretofore entered, and to permit him, the defendant, to have his original plea of not guilty entered of record to the end that he may have a trial upon the merits of his case before a jury. In support of said motion the defendant, by his attorneys, assigns the following reasons:

1st. Because said plea of guilty of murder in the second degree was improvidently entered.

2nd. Because the acting circuit attorney agreed with defendant and his attorneys, Messrs. Hay & Jones, that if he, defendant, would plead guilty to murder in the second degree, he, said circuit attorney, would agree to
39 and let him have a sentence of ten years in the penitentiary, at the outside, and also that if the law would permit the court to do so, he would agree to let him, the defendant, have the benefit of the time he has been incarcerated in the jail to be deducted from said ten years.

3rd. Because, relying upon this understanding with the acting circuit attorney, he withdrew his original plea of not guilty and entered the plea of guilty of murder in the second degree.

4th. Because he has been mislead by the officers and agreements made in regard to the entering of said plea.

5th. Because under no circumstances would he have plead guilty to murder in the second degree if he had not positively understood in his

conversation with the circuit attorney that he was to get no more than a ten years' sentence, and such is the fact.

6th. Because he has a just and legal defence on the merits.

PRESLY N. JONES,
Of Att'y for Defendant.

To which the defendant then and there objected, and prayed his bill of exceptions, which was granted.

JULY 2D, 1880.

The court takes said motion under advisement, as follows (copy of record):

FRIDAY, *July 2d*, 1880.

40 THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } Murder.

This day the court takes the motion to set aside the judgment herein, and permit defendant to withdraw his plea of guilty and enter a plea of not guilty, as submitted, and takes the same under advisement, and orders that the same be continued until next term.

TUESDAY, *July 6th*, 1880.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

This day the court sustains the motion to set aside the judgment herein, and to permit the defendant to withdraw his pl'a of guilty of murder in the second degree and enter a plea of not guilty to the indictment, and the court orders the case set for trial on September 13th, 1880.

Opinion of Judge Laughlin, of the St. Louis criminal court.

STATE
vs.
KRING.

Defendant, for nearly four years, defended against an indictment for murder of the first degree. With the consent of the acting circuit
41 attorney he then withdrew his plea of not guilty of murder of this degree and entered a plea of guilty of murder of the second degree. Thereupon the court sentenced him to a term of twenty-five years. He then filed his motion to set aside this sentence, and, in support of it, affidavits. This court adjudged the reasons assigned insufficient, and from this the defendant successfully prosecuted his appeal to the supreme court.

He now comes into court and without withdrawing his motion, which is still pending, asks, or rather says he elects to stand by his plea, and insists that the alleged agreement between him and the acting circuit attor-

ney as to the duration of his punishment be carried out. This court is bound to gran this motion; the supreme court has so decided. Defendant might at any time before submission withdraw this as he could any other motion, and thus leave his plea stand. But this he does not do, and hence this court finds the case now precisely as it stood when it before passed on and denied the application. This action of the court has been by the appellate tribunal declared to have been error and to overrule the motion now would be a plain refusal to obey the high mandate of that court. The motion therefore is granted and the case will be set down peremptorily for trial for the second week in September.

To which opinion and action of the court the defendant then and there excepted.

42 Afterwards, to wit, on July 12th, 1880, the following proceedings were had: The court directed the clerk to ask the defendant, and the clerk did ask the defendant, the following question: "Do you desire to withdraw your plea of guilty to murder in the second degree and enter a plea of not guilty to murder in the first degree?" The defendant answered them: "I have nothing further to say." Whereupon the court made the following order, viz: By order of the court the plea of guilty to murder in the second degree is set aside.

The court then ordered the defendant to be arraigned on the indictment. The clerk then read the indictment to the defendant and asked the defendant: "Are you guilty or not guilty?" Whereupon the defendant answered: "I have no answer to make. I stand by my plea, and the argreement." Whereupon the court ordered a plea of not guilty to murder in the first degree to be entered. Defendant then and there excepted to the action of the court.

October 1st, 1880, the attorney for the defendant and the assistant circuit attorney filed the following stipulation and agreement, as follows:

FRIDAY, *October 2d*, 1880.

THE STATE OF MISSOURI, PLAINTIFF,
vs.
CHARLES F. KRING, DEFENDANT. } 43. On indictment for murder.

The following agreement between the State and the defendant is this day filed, to wit:

43 STATE OF MISSOURI
vs.
CHARLES F. KRING. } Indictment for murder.

It is agreed by the above-named parties that the defendant shall have leave to file his bill of exceptions taken in this case at the next term of this court; this arrangement to be made between the parties now because of the absence of the circuit attorney, J. C. Normile, he being absent from the city of St. Louis.

(Signed) G. S. VAN WAGNER,
Att'y for Def't.

(Signed) E. A. NORNAN,
Assistant Circuit Att'y.

It is understood that the circuit attorney moved the court to permit the accused to re-enter his plea of not guilty, and the action of the court was with his consent.

The defendant permits this his bill of exceptions, and prays the court to allow the same as a proceeding in this cause, which is done this 29th day of October, 1880.

HENRY D. LAUGHLIN, *Judge.*

And at the November term, 1880, of said court, the following proceedings were had, to wit:

TUESDAY, *November 9th*, 1880.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } Murder.

This day comes Presley N. Jones, one of the attorneys for said defendant, and moves this court to make an order directing the jailor
44 of the city of St. Louis to allow the counsel of said defendant to obtain from said defendant and receive from him any and all communications relating to his said case free and uninspected, and especially that the attorneys of said defendant be allowed full and free communication with said defendant; and said Presley N. Jones files his affidavit in support thereof; whereupon it is ordered that the said jailor of the city of St. Louis be cited to appear before this court on Thursday next then and there to show cause, if any he can, why such order should not be made.

WEDNESDAY, *November 10th*, 1880.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

This day comes defendant, by his attorney, and files a motion for the court to make an order on the city jailor to show cause why he subjects said defendant to solitary confinement in his cell, and disobeys the order of the court in regard to the same, and the affidavit of the defendant is filed in support thereof.

THURSDAY, *November 11th*, 1880.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

This day comes Jeremiah Ryan, city jailor, and files his return to the rule to show cause herein issued in relation to communication be-
45 tween defendant and his counsel, to which return a demurrer is filed and the hearing of the matter is laid over until to-morrow.

THURSDAY, *November 11th*, 1880.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

This day it is ordered that a rule to show cause issue on jailor of city of St. Louis, commanding him to show cause why he disobeys the order of

this court made April 23d, 1879, in relation to letting defendant have freedom of jail as fully as was consistent with his safe keeping.

THURSDAY, *November* 11*th*, 1880.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } Murder.

This day comes the circuit attorney and files his motion for a special jury to try this cause.

FRIDAY, *November* 12*th*, 1880.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

This day comes the jailor and files his return to the rule in relation to keeping defendant confined in his cell, contrary to the order of the court. Whereupon the rule to show cause issued herein in relation to defendant communicating with his counsel, and the rule to show cause in relation to the defendant being confined in his cell are both argued and sub-
46 mitted to the court, and are by the court taken under advisement.

Motion for change of venue.

FRIDAY, *November* 26*th*, 1880.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

This day comes said defendant and files his petition for a change of venue herein, and his affidavit in support thereof.

SATURDAY, *November* 27, 1880.

THE STATE OF MISSOURI, PLAINTIFF,
vs.
CHARLES F. KRING, DEFENDANT. } 43. On indictment for murder 1st degree.

This day the defendant, being in custody, is brought into court by the sheriff, and the attorney of defendant also comes; thereupon the petition for a change of venue herein is heard by the court, testimony of witnesses being heard and argument of counsel, and the matter is submitted to the court and is by the court taken under advisement.

MONDAY, *November* 29*th*, 1880.

THE STATE OF MISSOURI, PLAINTIFF,
vs.
CHARLES F. KRING, DEFENDANT. } 43. On indictment for murder 1st degree.

This day the rule on jailor to show cause in relation to keeping the defendant confined in his cell is discharged, and on this day the court sustains the demurrer to the jailor's return to the rule to show cause in rela-

tion to communications between defendant and his counsel, and it
47 is ordered by the court that the jailor permit the counsel of defendant and defendant to have all communications referred to in the petition of defendant passed out of jail free and uninspected.

The court having considered the petition of said Charles F. Kring for a change of venue, and being thereof now fully advised, doth deny the same; and the court sustains the motion of the circuit attorney for a special jury herein, and orders that the sheriff summon three hundred good and lawful men, citizens of the city of St. Louis, to appear in our St. Louis criminal court on Monday, December 6th, 1880, then and there to serve as special jurors in the above-entitled cause until discharged.

Motion.—Special venire.

TUESDAY, *November 30th*, 1880.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

This day comes the defendant, by his attorney, and files his motion for a special venire from the county of St. Louis.

THURSDAY, *December 2d*, 1880.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

This day the court overrules defendant's motion for a jury from the county of St. Louis.

THURSDAY, *December 9th*, 1880.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

48 On motion of defendant's attorney, it is ordered that the order overruling defendant's motion for a jury from the county of St. Louis be set aside and held for naught, and that said motion be placed back on the law.

FRIDAY, *December 10th*, 1880.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

This day the motion for a special jury from the county of St. Louis is argued and submitted to the court, and is by the court taken under advisement.

SATURDAY, *December* 11*th*, 1880.

THE STATE OF MISSOURI
vs. } 43. Murder.
CHARLES F. KRING.

This day the court doth order that the order sustaining the motion of the State for a special jury from the city of St. Louis be set aside and held for naught, and thereupon the court doth overrule said motion; and the court having considered defendant's motion for a jury from the county of St. Louis doth sustain the same, and orders that a special venire be issued commanding the sheriff to summon three hundred good and lawful men who reside in St. Louis County, outside the city of St. Louis, to be and appear in our St. Louis criminal court on Wednesday, De-
49 cember 15th, A. D. 1880, then and there to serve as jurors in the cause until discharged.

THURSDAY, *December* 16*th*, 1880.

THE STATE OF MISSOURI
vs. } 43. Murder.
CHARLES F. KRING.

It is ordered by the court that this case be continued.

THURSDAY, *December* 30*th*, 1880.

THE STATE OF MISSOURI
vs. } 43. Murder.
CHARLES F. KRING.

A stipulation between the circuit attorney for defendant is this day filed, in which it is stipulated and agreed that defendant's bill of exceptions herein may be filed during the next term of the court (on or before Jan. 15th, 1881), with like force and effect as if filed during the present term.

At January term, 1881, the following proceedings were had:

SATURDAY, *January* 15*th*, 1881.

THE STATE OF MISSOURI
vs. } 43. Murder.
CHARLES F. KRING.

This day the following stipulation is this day filed, to wit:

THE STATE OF MISSOURI
vs.
CHARLES F. KRING.

It is hereby stipulated and agreed that three days' further time be given the defendant and his counsel within which to file his bill of ex-
50 ceptions in the above case. Jan. 15. (Signed) Jos. R. Harris, cir-

cuit attorney. The above extension of time was given at the special request of defendant's counsel.

(Signed) L. D. SEWARD,
P. N. JONES,
Att'ys for Def't.

TUESDAY, *January* 18, 1881.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

It is ordered that this cause be continued by consent.

TUESDAY, *January 25th*, 1881.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

The following stipulation being this day filed, to wit:

STATE OF MISSOURI
vs.
CHARLES F. KRING.

Defendant's attorneys may have ten days' further time to file bill of exceptions in the above-entitled cause, Jan. 25, 1881. (Signed) Jos. R. Harris, circuit attorney. Whereupon it is ordered by the court that the defendant have ten days' further time herein in which to prepare and file his bill of exceptions.

TUESDAY, *February 1st*, 1881.

THE STATE OF MISSOURI, PLAINTIFF,
vs.
CHARLES F. KRING, DEFENDANT. } 43. On indictment for murder in the first degree.

Upon the following stipulation being filed, to wit:

51 STATE OF MISSOURI
vs.
CHARLES F. KRING.

By consent of circuit attorney and counsel for the defendant, the defendant is to have the balance of the term as the time within which to file his bill of exceptions herein. This stipulation is to go upon the record, and to be made part thereof.

(Signed) JOS. R. HARRIS,
Circuit Attorney.

(Signed) P. N. JONES,
L. D. SEWARD,
Att'ys for Def't.

It is ordered by the court that the defendant have the balance of the term in which to file his bill of exceptions.

SATURDAY, *February 26th*, 1881.

THE STATE OF MISSOURI
vs.
CHARLES F. KRING. } 43. Murder.

This day comes the defendant, by his attorneys, and files his bill of exceptions herein, which is as follows:

Bill of exceptions.

STATE OF MISSOURI
vs.
CHARLES F. KRING. } Indictment for murder in the first degree.

St. Louis criminal court, November term, 1880.

Be it remembered that on the day of November, 1880, the following proceedings were had in said above-entitled case as follows, viz: The defendant, by his attorneys, on November 26th, 1880, filed a motion or petition for a change of venue in said cause, on account of the pre-
52 judice of the inhabitants of the city of St. Louis against said defendant, which petition is as follows:

In the criminal court of the city of St. Louis, Mo.

STATE OF MISSOURI
vs.
CHARLES F. KRING. } Indictment for murder, 1st degree.

Now at this time comes Charles F. Kring, defendant in the above-entitled cause, and states that the minds of the inhabitants of said city of St. Louis are so prejudiced against him that he cannot have a fair trial in the above cause in the said city of St. Louis; and he further states that the fact that the minds of the inhabitants of said city of St. Louis were so prejudiced against him that he could not have a fair trial in the said city of St. Louis, in the above-entitled cause, first came to his knowledge since the last proceeding continuance of said cause, which was on October 18th, 1880.

Wherefore the said defendant, Charles F. Kring, asks that the venue in said case be changed to some county in this State where such prejudice does not exist.

The said Charles F. Kring, being duly sworn, says that the matters and things set forth in the above and foregoing petition are true, as therein stated.

CHARLES F. KRING.

Sworn to and subscribed before me this 24th day of November, A. D. 1880.

ANDREW J. CLABBY,
Clerk Criminal Court.

53 In support of said motion or petition for a change of venue from the city of St. Louis, the following testimony was introduced and heard by the court.

Chas. Taylor.

Charles A. Taylor, sworn, testified as follows:

Am a newspaper reporter; have been living in St. Louis since 1871 or 1872. Was a reporter on *on* the Globe-Democrat during the years 1874, 1875, 1876, 1878, and 1879. Am a reporter on the Missouri Republican at present. My business brings me in contact with a great many people. Know of the Kring case. Have heard a great many people express themselves in regard to the Kring case. T'ere is a very wide-spread prejudice against Kring in this city. That prejudice, would, I think, prevent a fair trial. I don't think twelve men could be obtained who would give Kring a fair trial. The prejudice against Kring has been helped along by me. I have written Kring up twice. The prejudice against Kring arises from various causes. He was once convicted, once sentenced, and never punished. The character of the newspaper articles in the Kring case were very severe, referring to the killing of women. Public kind of clamored for his blood. Referred to him as a red-handed murderer.

H. E. Campbell.

Henry E. Campbell, being sworn, testified as follows:

Am a reporter on the St. Louis Evening Chronicle. Know of the Kring case. There is a strong and deep-seated prejudice against him.
54 Never heard anything in his favor. Think it would be difficult for Kring to get a fair trial; don't think he can. Have read the newspaper articles; in substance they correspond to public sentiment. I think he is guilty. My opinion is that he can't get a fair trial in the city of St. Louis.

G. S. Van Wagner.

G. S. Van Wagner, being sworn, testified as follows:

Am an attorney at law; in practice here since 1853. Have a great many acquaintances; my acquaintance with people in St. Louis is very extensive. Was at one time of cou'sel for defendant Kring. Have heard the case frequently spoken of; there is a deep-seated prejudice against Kring; it is wide-spread, and pervades all classes of people; have yet to hear one person express himself for Kring. It would be very difficult to get twelve intelligent men to try Kring. The newspaper articles have been outrageous. One referred to Kring as chairman of the murderer's club in the jail. There has been so much notoriety given the case—its having been tried so often, the hostile attitude of the press, the well-known deep-seated prejudice—that I doubt that twelve men could be got who would give defendant a fair trial.

L. A. Pratt.

L. A. Pratt, being sworn, testified as follows:

I am the proprietor of Barnum's Hotel, in the city of St. Louis. I meet a great many people. I have often heard of the Kring case;
55 have frequently seen newspaper articles regarding it; have often heard it discussed in connection with denunciatory articles; people seemed to assent to it. My judgment is it would be impossible for Kring to get a fair trial in the city of St. Louis.

R. M. Johnson.

R. M. Johnson, being sworn, testified as follows:

Am an attorney at law; practiced here the last four years; meet a great many people. Have often heard the Kring case discussed. There is a very strong prejudice against him; it is marked and distinct. Don't think he could get a fair trial.

T. E. Price.

Thomas E. Price, being sworn, testified as follows:

Am a real estate agent; have my office on Chestnut street; have lived here since 1873; prior to that in St. Louis County; meet many people; have heard the case discussed very frequently. There is a strong prejudice against him. Every one believes him guilty, and ought to be hung; have read denunciatory newspaper articles in regard to him, denouncing his defense; don't believe he can get a fair trial in the city of St. Louis.

C. P. Johnson.

Charles P. Johnson, being sworn, testified as follows:

Am an attorney at law; have been since 1855. There is a strong prejudice against Kring. The case has been discussed extensively by
56 all classes of intelligent people. The prejudice is *is* very strong. The newspaper articles have been very abusive. The case is a remarkable one, and I think there are very few people who can discuss it and rationally understand it. It is true that there is a strong feeling in all these cases, and in this the prejudice might affect the decision or result. I think so. A jury might be got to try him, but I mean simply to say that although a jury might be obtained, the feeling in the city of St. Louis is such that the least vibration would change the result.

E. J. Delehunty.

E. J. Delehunty, being sworn, testified as follows:

Am an attorney at law; practicing here since since 1876; know of the Kring case; have heard it discussed quite frequently. I have a fair circle of acquaintances. There is a very strong prejudice against Kring; never heard anything for him; have read various denunciatory newspaper articles in regard to Kring and his case. They were very severe. I don't

think a jury of intelligence could be got in the city of St. Louis to give him a fair trial.

J. W. Sutherland.

John W. Sutherland, being sworn, testified as follows:

Am a real estate agent. My office is on Olive street. Was a candidate for State senate at last election; meet a great many people; have a large acquaintance; heard the case discussed; have read the various
57 newspaper articles denouncing Kring. Judging from what I know and what I have heard, there is a strong prejudice against Kring. Don't think he could get a fair trial in the city of St. Louis.

Henry Warmhoff.

Henry Warmhoff, being sworn, says:

I am an attorney at law; reside in the northern part of the city; meet a great many people, Americans and Germans; mingle with an intelligent class of people; from what I know there is a strong prejudice against Kring; don't think he can get a fair trial in the city of St. Louis.

P. N. Jones.

Presly N. Jones, of counsel for defendant, being sworn, testified as follows:

Have heard this case discussed by all classes of people in all parts of the city; the prejudice against Kring is actual and real; I don't believe that twelve intelligent men could be got together in the city of St. Louis, who would give the defendant a fair trial. This prejudice pervades all classes of people. The information as to this prejudice was conveyed to the defendant since the last continuance of the case; I then told him the condition and advised a change of venue.

The State introduced no evidence in rebuttal, and did not cross-examine the witnesses introduced by the defense. After hearing the evidence, the court took said motion for a change of venue under advisement,
58 *under advisement*, and on Monday, November 29th, 1880, denied the same; to which said action of the court the defendant, by his counsel, then and there excepted.

On the 30th day of November, 1880, the following further proceedings were had in said case.

The defendant, by his counsel, filed a motion for a jury from St. Louis County, as follows:

In the *the* criminal court of the city of St. Louis.

STATE OF MISSOURI
vs.
CHARLES F. KRING. } Indictment for murder, 1st degree.

Now, at this time comes Charles F. Kring, defendant in the above entitled cause, and states that the minds of the inhabitants of the city of

St. Louis are so prejudiced against him that he cannot have a fair trial in said above-entitled cause in said city of St. Louis; that the fact that the minds of the inhabitants are so prejudiced against him that he could not have a fair trial in said above-entitled cause in said city of St. Louis first came to his knowledge since the last preceeding continuance of said cause, October 18th, 1880.

He therefore asks the court to order a special venire to be issued for a jury consisting of persons who reside in the county of St. Louis, and outside of the city of St. Louis.

CHARLES F. KRING.

Charles F. Kring, being duly sworn, on his oath says that the matters and things stated in above and foregoing petition are true,

CHAS. F. KRING.

59 Sworn to and subscribed before me this 30th day of November, A. D. 1880.

ANDREW J. CLABBY,
Clerk Criminal Court.

Which said motion was on December 2d, 1880, overruled by the court. On December 9th, 1880, the court, of its own motion, set aside the order overruling the motion for a jury from St. Louis County, placed the same on the law docket for argument. On December 10th, 1880, said motion was called for argument. The circuit attorney took the position that the court had no power to summon a jury from the county, and the counsel for the defendant also stated to the court that the more he investigated the matter the more he was satisfied that the defendant was entitled to a change of venue and not to a jury from the county. On 11th of December, 1880, the court sustained said motion for a jury from St. Louis County, and rendered the following opinion in regard thereto, viz:

Application for a jury from St. Louis County.

STATE
vs.
KRING.

The defendant files his petition, sustained by his own affidavit, alleging that the minds of the inhabitants of St. Louis are prejudiced against him, and praying that a jury from St. Louis County be summoned to try him. The application is made under section 18 of the act establishing this court, which provides as follows:

"SECTION 18. It shall not be lawful for a person indicted in St. Louis County [city] to obtain a change of venue to any other county,
60 but if any person thus indicted shall file his petition, supported by the affidavit of himself or some disinterested respectable person, stating that the minds of the inhabitants of the city of St. Louis are prejudiced against him, then a special venire shall be issued to summon a jury consisting of persons who reside in St. Louis County, outside of the city of St. Louis, to try said cause; and if any person thus indicted shall sign

a petition and affidavit as above, stating that the minds of the inhabitants of said county who reside outside of the city of St. Louis are prejudiced against him, then a venire shall issue on said cause to summon a jury consisting of persons who reside in the city of St. Louis to try said cause."

Though the defendant makes the application, it is conceded by his counsel and it is claimed by the circuit attorney that it cannot be granted, because this provision of the law is invalid. To this view the court was at first persuaded, both sides so contending, but on further investigation and reflection I am forced to a different conclusion. It may present a singular and possibly an impossible predicament, but that is no argument against the validity of the law or the existence of the prisoner's right to the order, for if the right is given him the court has no power to take it from him, whether it has under the peculiar order of things worked by the separation of city and county, the power to enforce it or not.
61 If it has the power it will enforce it; if it has not it must wait until the legislature shall provide it. But this question may or may not arise further on. When it does, it will be time enough to deal with it. As a general proposition it must be conceded that the general assembly have power to regulate the practice in respect to changes of venues in criminal as well as in civil cases. They cannot confer the right in one part of the State and wholly deny it in another. But they may prescribe one method for its exercise in St. Louis and a different one outside. This is what has been done here. Instead of taking the prisoner to the jury who are to try him, and with him the witnesses in the case, the jury is to be brought to him. This was reasonable enough before the separation, but now, since St. Louis County has been detached from the eighth judicial district and attached to the nineteenth, it appears to counsel to be ridiculously unreasonable. It may be, but still this is no argument against the validity of the law. The solemn acts of the law-making power are not to be blotted from the statute books.

But is the provision invalid? It is claimed that it was repealed by that provision of the constitution which says (art. 9, sec. 20) "and if a majority of said qualified voters voting at such election shall ratify such scheme and charter, then such scheme shall become the organic law of the county and city, and such charter the organic law of the city, and
62 at the end of sixty days thereafter shall take the place and supercede the charter of St. Louis, and the amendments thereof, and all special laws relating to St. Louis County inconsistent with *with* such schemes." Now, this provision, as will be seen by inspection, is not only not inconsistent with the scheme, but is perfectly consistent with it, for it expressly undertakes to provide for summoning both grand and special jurors from the county outside of the city as well as from the city itself. For about one year after the adoption of the scheme and charter it is well known St. Louis County, though separate from the city, remained a part of the eighth judicial district of the State, and it is even doubted yet whether it is not still a part of it, notwithstanding the act which undertakes to detach it and make it a part of the nineteenth. For a year, then, in so far as cases pending in this court were concerned, no change was worked by the new order of things. But on the 18th day of April, 1877, the act making St. Louis County a part of the nineteenth district was approved, and ninety days after the adjournment of the twenty-ninth general

assembly, if valid, went into effect. It was not until this occurred that any change in respect to the administration of justice in the city was worked. From this it will be seen that the provisions under which this application was made is inconsistent (if inconsistent with anything)
63 with the act of April 28th, 1877, only, and hence not repealed by this provision of the constitution. But if it is inconsistent with no provision of law, at least none which has been pointed out, and none which I am able to find, in my opinion it is valid. If valid the court is bound to grant the application. It is accordingly so ordered.

Application granted.

The application of the defendant for a jury from the county was thereupon granted on the 11th of December, and at his request, expressed through his counsel, three hundred men were ordered summoned to appear on the 15th day of December, 1880, and the case was laid over to that day. On this day some two hundred and ninety of these men answered, and thereupon the defendant presented a challenge to the array, as follows:

County jurors challenged.

In the St. Louis criminal court.

STATE OF MISSOURI }
vs.
CHARLES F. KRING. }

And now comes the defendant, by his attorneys, and challenges the array or panel of jurors summoned to try the above-entitled cause, for the following reasons:

1st. Because said panel of jurors summoned to try said cause were summoned without authority or warrant of law.

2d. Because said panel of jurors are not resident of the city of St. Louis.

64 3d. Because said jurors live and reside beyond the limits of the city of St. Louis, viz, in the county of St. Louis.

4th. Because said panel of jurors were summoned by the sheriff of the city of St. Louis.

5th. Because the sheriff of the city of St. Louis has no power to summon a jury from the county of St. Louis.

6th. Because said above-entitled cause is pending in the criminal court of the eighth judicial circuit, and said jury are summoned from the 19th judicial circuit.

7th. Because, under the constitution, the defendant can only be tried by a jury of the county [city] where his said cause is pending.

CHAS. P. JOHNSON,
DANIEL HAY,
L. D. SEWARD,
P. N. JONES,
Attorneys for Defendant.

This was by the court denied, and thereupon, on December 15th, 1880, the following further proceedings were had: That defendant, by his counsel, presented to the court an application for a special judge, supported by the affidavits of defendant and those of four citizens, as follows, to wit:

In the criminal court of the city of St. Louis, State of Missouri.

STATE OF MISSOURI
vs.
CHARLES F. KRING. } Indictment for murder 1st degree.

65 *Kring's application of prejudice & motion for special judge.*

Now at this time comes Charles F. Kring, defendant in above-entitled cause, and states that Henry D. Laughlin, judge of the criminal court of the city of St. Louis, State of Missouri, is so prejudiced against him that he will not give him a fair trial in the above-entitled cause, or impartially decide his application for a change of venue, on account of the prejudice of the minds of the inhabitants of said city of St. Louis, State of Missouri. The defendant, Charles F. Kring, therefore asks for an order for the election of a special judge to decide his application for a change of venue or to try said cause.

CHARLES F. KRING.

Charles F. Kring, the defendant in the above-entitled cause, first duly sworn, says that the matters and things set forth in the above and foregoing petition for an order for an election of a special judge to try the above-entitled cause are true as therein stated.

CHARLES F. KRING.

Sworn to and subscribed before me this 4th day of December, A. D. 1880.

ANDREW J. CLALBY, *Clerk.*

Affidavit of H. E. Campbell.

H. E. Campbell, being duly sworn, upon his oath says the mat-
66 ters and things set out in the above named and foregoing petition for an order for the election of a special judge to try the above-entitled cause are true as therein stated.

HARRY E. CAMPBELL.

Subscribed and sworn to before me this Dec. 4th, 1880.
[SEAL.] LYN. S. BROTHERTON,
Notary Public.

Affidavit of T. E. Price.

Thomas E. Price, of lawful age, being first duly sworn, on oath says the matters and things set out in the above and foregoing petition for an order for an election of a special judge to try the above-entitled cause are true as therein stated.

THOMAS E. PRICE.

Sworn to and subscribed before me this 14th day of December, A. D. 1881.

EDWARD H. PONATH,
Notary Public, City of St. Louis.

John W. Sutherland, of lawful age, first being duly sworn, on his oath says the matters and things set forth in the above and foregoing petition for an order for the election of a special judge to try said above-entitled cause or for the application for a change of venue are true as therein stated.

J. W. SUTHERLAND.

67 Subscribed and sworn to before me this Dec'b'r 4th, 1880.
[SEAL.] LYN. S. BROTHERTON,
Notary Public.

Affidavit of L. A. Pratt.

L. A. Pratt, of lawful age, first duly sworn, says the matters and things set forth in the above and foregoing petition for an order for the election of a special judge to hear and decide defendant's application for a charge of venue or to try the above-entitled cause are true as herein stated.

L. A. PRATT.

Subscribed and sworn to before me this Dec'b'r 4th, 1880.
[SEAL.] LYN S. BROTHERTON,
Notary Public.

The court thereupon took this application under advisement and adjourned until the following day, and on said day, to wit, on the 16th day of December, 1880, without passing on said application for a special judge, without sustaining or denying it, of its own motion, discharged the jury summoned from the county to try said case, and continued the same for the term.

* * * * * * *

138 And at the March term, 1881, of said court the following proceedings were had, to wit:

139 WEDNESDAY, *April* 27, 1881.

THE STATE OF MISSOURI, PLAINTIFF, *vs.* CHARLES F. KRING, DEFENDANT. } 43. On indictment for murder, 1st degree.

Now, at this day this cause coming on to be heard, and regular judge of the court being, by reason of the affidavits heretofore filed herein by defendant, incompetent to try this cause, and it further appearing to the court that the circuit attorney and defendant cannot agree, in writing, in the selection of some attorney at law who possesses the qualifications of a judge of the circuit court, or of a special judge as provided by section 1878 of the Revised Statutes, and the court being advised and informed by the indictment herein that the charge against the defendant in the above cause is

murder in the first degree, the same being a felony, and it being also the opinion of the court that no competent or suitable person could be selected as special judge to try this cause, it is ordered by the court that this cause be now continued until the May term next ensuing, and that it then be set down for trial at said May term on the 10th day of May, 1880, and that the Hon. G. H. Burckhart, sole presiding and acting judge of the circuit court of the second judicial circuit of the State of Missouri, be
140 designated, notified, and requested to appear at said time and on said 10th day of May, A. D. 1881, and try this cause; and to the end that he receive due notice of his order, it is further ordered that the clerk of this court forthwith make out and send to him by mail a certified copy hereof.

Whereupon defendant is allowed ten days' time in which to prepare and file his bill of exceptions herein.

And at the May term, 1881, the following proceedings were had, to wit:

MONDAY, *May* 2*d*, 1881.

THE STATE OF MISSOURI, PLAINTIFF, *vs.* CHARLES F. KRING, DEFENDANT. } 43. On indictment for murder, first degree.

On motion of the attorney of defendant it is ordered that the ten days' time heretofore allowed defendant in which to prepare and file his bill of exceptions herein be, and the same is hereby, extended to twenty days. Thereupon Charles P. Johnson, of counsel for defendant, withdraws from the case as such counsel.

TUESDAY, *May* 10*th*, 1881.

Hon. G. H. Burckhartt, judge, presiding.

THE STATE OF MISSOURI, PLAINTIFF, *vs.* CHARLES F. KRING, DEFENDANT. } 43. On indictment for murder in the first degree.

141 This day comes the circuit attorney who represents the State, and the defendant, being in custody, is brought into court by the sheriff, and the attorneys of defendant also come; also comes the Hon. G. H. Burckhartt, sole presiding and acting judge of the second judicial circuit of the State of Missouri, heretofore duly designated, notified, and requested to appear at this term and on this day, and try this case in place of the regular judge of the St. Louis criminal court, who is, by reason of the affidavits heretofore filed by defendant herein, disqualified to try the same, and thereupon said Hon. G. H. Burckhartt, judge aforesaid, enters upon the discharge of his duties in respect to the trial of this cause. Thereupon the circuit attorney announces to the court that Charles F. Joy will assist the circuit attorney in the prosecution of this cause, and the same is ordered entered, thereupon the defendant, by his attorneys, files a motion

to set aside the order of court overruling defendant's motion for a change of venue, and the same is argued and submitted to the court, and is by the court overruled. Thereupon defendant, by his attorneys, files a motion to set aside the order made herein designating, notifying, and requesting Hon. G. H. Burckhartt to try the cause, and the same is argued and
142 submitted to the court, and is by the court overruled. Thereupon defendant, by his attorneys, files a motion to have the cause transferred to the circuit court of St. Louis County, and the same is argued and submitted to the court, and is by the court overruled. Thereupon defendant, by his attorney, files a motion to quash the indictment herein, and the same is overruled. Thereupon defendant, by his attorney, files a motion to transfer the cause to the circuit court of the city of St. Louis, and the same is overruled. Whereupon further proceedings herein are deferred until to-morrow morning.

WEDNESDAY, *May* 11*th*, 1881.

Hon. G. H. Burckhartt, presiding.

THE STATE OF MISSOURI, PLAINTIFF, *vs.* CHARLES F. KRING, DEFENDANT. } 43. On indictment for murder in the first degree.

This day comes the circuit attorney who represents the State, and the defendant, being in custody, is brought into court by the sheriff, and the attorneys of defendant also come, also comes Hon. G. H. Burckhartt, sole presiding and acting judge of the second judicial circuit of the State of Missouri, setting in place of the regular judge of this court for the trial of this cause as aforesaid; thereupon the defendant, by his
143 attorney, files a motion and affidavits for a continuance herein, and the same is by the court overruled, and the examination of the jurors for the trial of this cause is ordered proceeded with and the selection and examination of the jury not being concluded at the hour of adjournment, further proceedings herein are deferred until to-morrow.

THURSDAY, *May* 12*th*, *A. D.* 1881.

Hon. G. H. Burckhartt, judge, presiding.

THE STATE OF MISSOURI, PLAINTIFF, *vs.* CHARLES F. KRING, DEFENDANT. } 43. On indictment for murder in the first degree.

This day comes the circuit attorney who represents the State, and the defendant, being in custody, is brought into court by the sheriff, and the attorneys of *of* defendant also come; also comes the Hon. G. H. Burckhartt, sole presiding and acting judge of the circuit court of the second judicial circuit of the State of Missouri, setting in the trial of this cause in place of the regular judge of this court as aforesaid. Thereupon the selection and examination of the jury for the trial of this cause proceeds, but not being concluded at the hour of adjournment, further proceedings herein are deffer'ed until to-morrow morning.

FRIDAY, *May* 13*th*, 1881.

Hon. G. H. Burckhartt, judge, presiding.

144 THE STATE OF MISSOURI, PLAINTIFF, *vs.* CHARLES F. KRING, DEFENDANT. } 43. On indictment for murder in the first degree.

This day again comes the circuit attorney who represents the State, and the defendant, being in custody, is brought into court by the sheriff, and the attorneys of defendant also come; also comes the Hon. G. H. Burckhartt, sole presiding and acting judge of the circuit court of the second judicial circuit of the State of Missouri, setting in the place of the regular judge of this court for the trial of this cause; thereupon the selection and examination of the jury for the trial of this cause proceeds, and not being concluded at the hour of adjournment, further proceedings herein are deferred until to-morrow morning.

SATURDAY, *May* 14, *A. D.* 1881.

Hon. G. H. Burckhartt, judge, presiding.

THE STATE OF MISSOURI, PLAINTIFF, *vs.* CHARLES F. KRING, DEFENDANT. } 43. On indictment for murder in the first degree.

This day again comes the circuit attorney who represents the State, and the defendant, being in custody, is brought into court by the sheriff,
145 and the attorneys of defendant also come; also comes Hon. G. H. Burckhartt, sole presiding and acting judge of the circuit court of the second judicial circuit of the State of Missouri, setting in place of the regular judge of this court for the trial of this cause. Thereupon the selection and examination of the jury for the trial of this cause proceeds, and being concluded, and a panel of forty-seven qualified jurors being obtained, it is ordered by the court that the sheriff forthwith deliver to the defendant a list of said forty-seven jurors, and at 3 o'clock p. m. of this day said list is furnished to defendant and receipt of same at said hour acknowledged by defendant in open court; whereupon it is ordered that defendant have until Monday afternoon next at thirty minutes past three o'clock in which to make his challenges, and it is further ordered that the State furnish and exhibit its challenges to defendant at or before eleven o'clock in the forenoon of said Monday next. Whereupon each and all of said forty-seven qualified jurors are called within the bar; and thereupon each and all are admonished by the court that it is their duty not to converse among themselves nor to suffer others to converse with them or in their hearing
on any subject connected with the case, or to form or express any
146 opinion thereon. Whereupon further proceedings herein are deferred until Monday afternoon next a' thirty minutes past three o'clock.

MONDAY, *May* 16*th*, 1881.

Judge G. H. Burckhartt, presiding.

THE STATE OF MISSOURI, PLAINTIFF, *vs.* CHARLES F. KRING, DEFENDANT. } 43. On indictment for murder in the first degree.

This day comes again the circuit attorney who represents the State, and the defendant, being in custody, is brought into court by the sheriff, and the attorneys of the defendant also comes; also comes Hon. G. H. Burckhartt, sole presiding and acting judge of the circuit court of the second judicial circuit of the State of Missouri, setting in the place of the regular judge of this court for trial of this cause; thereupon comes Chas. P. Johnson and asks that his name be again entered as counsel for defendant; Thereupon, at thirty minutes past three o'clock p. m. of this day, the defendant and the State deliver to the court their challenges; whereupon the twelve remaining unchallenged are ordered to come into the box.

Thereupon come said twelve jurors, to wit: Philip Faith, Ed-
147 ward Dippold, Henry Teilgens, Frank E. Brod, Alexander Heburn, Jas. Fitzgerald, Edward P. Fox, A. B. McIntire, Jos. W. White, Henry P. Rude, Jas. B. Hagen, Thomas Shea, twelve good and lawful men, who, being duly elected and tried and sworn the issues herein between the State of Missouri, plaintiff, and Charles F. Kring, defendant, well and truly *and* try *to* a true verdict render according to the evidence. Thereupon the trial of this cause proceeds, and the testimony of the witnesses is partly heard, when further proceedings herein are deferred until to-morrow morning.

Judge G. H. Burckhartt presiding.

TUESDAY, *May* 17*th*, 1881.

THE STATE OF MISSOURI, PLAINTIFF, *vs.* CHARLES F. KRING, DEFENDANT. } 43. On indictment for murder in the first degree.

This day again comes the circuit attorney, who represents the State, and the defendant being in custody is brought into court by the sheriff, and the attorneys of defendant also comes; also comes Hon. G. H. Burckhartt, sole presiding and acting judge of the circuit court of the second judicial circuit of the State of Missouri; sitting in place of the regular judge of this court for the trial of this cause; and the jurors aforesaid also
148 come. Thereupon the trial of this cause proceeds, and the testimony of the witnesses is further heard, but not being concluded at the hour of adjournment further proceedings are herein deferred until to-morrow morning.

WEDNESDAY, *May* 18*th*, 1881.

Judge G. H. Burckhartt presiding.

THE STATE OF MISSOURI, PLAINTIFF, *vs.* CHARLES F. KRING DEFENDANT. } 43. On indictment for murder in the first degree.

On this day comes the circuit attorney, who represents the State, and the defendant being in custody is brought into court by the sheriff, and the

attorneys of defendant also come; also come Hon. G. H. Burckhartt, sole presiding and acting judge of the circuit court of the second judicial circuit of the State of Missouri, sitting in place of the regular judge of this court for the trial of this ; and the jurors aforesaid also come. Thereupon the trial of this cause proceeds, and the testimony of the witnesses is further heard, but not being concluded at the hour of adjournment further proceedings herein are deferred until to-morrow morning:

THURSDAY, *May 19th*, A. D. 1881.

Judge G. H. Burckhartt presiding.

149 THE STATE OF MISSOURI, PLAINTIFF, *vs.* CHARLES F. KRING, DEFENDANT. } 43. On indictment for murder in the first degree.

This day again comes the circuit attorney, who represents the State, and the defendant being in custody is brought into court by the sheriff, and the attorneys of defendant also come; also comes Hon. G. H. Burckhartt, sole presiding and acting judge of the circuit court of the second judicial circuit of the State of Missouri, sitting in place of the regular judge of this court; and the jurors aforesaid also come. Thereupon the trial of this cause proceeds, and the testimony of the witnesses is further heard, and being concluded further proceedings herein are deferred until to-morrow morning.

FRIDAY, *May 20th*, 1881.

Judge G. H. Burckhartt presiding.

THE STATE OF MISSOURI, PLAINTIFF, *vs.* CHARLES F. KRING, DEFENDANT. } 43. On indictment for murder in the first degree.

On this day comes the circuit attorney, who represents the State, and the defendant being in custody is brought into court by the sheriff, and the attorneys of defendant also come; also comes Hon. G. H. Burckhartt, sole presiding and acting judge of the circuit court of the
150 second judicial circuit of the State of Missouri, sitting in place of the regular judge of this court for the trial of this cause; and the jurors aforesaid also come. Thereupon the jury received their instructions from the court. Whereupon the argument of counsel was heard, and being concluded the case is submitted to the jury for their verdict in the premises, and they retire to consider thereof, in charge of two deputy sheriffs, who have been duly sworn to keep them together in the rooms set apart for the juries of this court, and not permit any person to speak or communicate with them, or do so himself, unless by order of court, or to ask them if they have agreed upon a verdict.

(Oath of officer filed.)

SATURDAY, *May* 21*st*, 1881.

Judge G. H. Burckhartt presiding.

THE STATE OF MISSOURI, PLAINTIFF, *vs.* CHARLES F. KRING, DEFENDANT. } 43. On indictment for murder in the first degree.

This day again comes the circuit attorney, who represents the State, and the defendant being in custody is brought into court by the sheriff, and the attorneys of defendant also come; also comes Hon. G. H. Burckhartt, sole presiding and acting judge of the circuit court of the
151 second judicial circuit of the State of Missouri, sitting in place of the regular judge of this court for the trial of this cause; and the jurors aforesaid being agreed among themselves upon a verdict herein are conducted into court by the officers having them in charge, and, the defendant being present, render the following verdict, to wit:

St. Louis criminal court, May term, 1881.

STATE OF MISSOURI *vs.* CHARLES F. KRING. } 43. Charge with murder, 1st degree.

Verdict.

We, the jury in the above-entitled cause, find the defendant, Charles F. Kring, guilty of murder in the first degree, as charged in the indictment.

EDWARD P. FOX,
Foreman.

(Verdict and instructions filed.)

WEDNESDAY, *May* 25*th, A. D.* 1881.

Judge G. H. Buckhartt presiding.

THE STATE OF MISSOURI, PLAINTIFF, *vs.* CHARLES F. KRING, DEFENDANT. } 43. On indictment for murin the first degree.

On this day comes Hon. G. H. Burckhartt, sole presiding and acting judge of the circuit court of the second judicial district of the
152 State of Missouri, sitting in place of the regular judge of this court for the trial of this cause, and resumes the discharge of his duties; also comes the circuit attorney, who represents the State, and the defendant being in custody is brought into court by the sheriff, and the attorneys of defendant also comes.

Thereupon the motion for a new trial herein is argued and submitted, and the court having considered the same, and being thereof now fully advised, doth overrule the said motion; thereupon defendant, by his attorney, files a motion in arrest of judgment herein, and said motion being submitted to the court is by the court overruled.

Thereupon defendant is demanded by the court if he hath or knoweth anything to say why the court should not now proceed to pass sentence of death upon him, in accordance with the verdict heretofore rendered against him, and having nothing to say except that which he hath before said:

Judgment.

It is therefore considered and adjudged by the court that said defendant, Charles F. Kring, for his offense of murder in the first degree, as charged in said indictment, and in pursuance of the verdict rendered
153 against him, be taken from this court to the place from whence he came, there to be safely kept until Friday, the fifteenth day of July, A. D. 1881; that on that day he be taken thence to the usual place of execution in the city of St. Louis, and there, on said Friday, the fifteenth day of July, A. D. 1881, between the hours of ten o'clock in the forenoon and five o'clock in the afternoon of said day, he be hanged by the neck until he be dead.

And it is ordered by the court that the clerk of this court make out a warrant commanding the sheriff of the city of St. Louis to carry this sentence and judgment into execution.

Whereupon, on motion of the attorney for defendant, it is ordered that the official reporter of this court make out and deliver to defendant on or before June 10th, 1881, a full transcript of the proceedings in this cause as taken down by him.

Appeal granted.

Thereupon defendant, by his attorneys, prays an appeal from the judgment herein rendered against him to the St. Louis court of appeals; and the affidavit of defendant is filed in support thereof, and the court doth grant said appeal, and the following stipulations being filed, to wit:

In the criminal court of the city of St. Louis, State of Missouri, May term, 1881.

STATE OF MISSOURI }
vs. }
CHARLES F. KRING. }

154 It is stipulated and agreed by and between Joseph R. Harris, circuit attorney, and Chas. P. Johnson, L. D. Seward, P. N. Jones, and Daniel Hay, attorneys for defendant, that the defendant may have an extension of time until the 20th day of June, 1881, to file a bill of exceptions in the above-entitled cause.

(Signed) JOSEPH R. HARRIS,
Circuit Attorney.

It is ordered by the court that defendant have until the 20th day of June next in which to prepare and file his bill of exceptions herein; thereupon defendant prays the court to grant a stay of execution upon said judgment until the same may be heard by the court of appeals, and the same is denied by the court.

TUESDAY, *June* 29*th*, 1881.

Hon. G. H. Burckhartt presiding.

THE STATE OF MISSOURI, PLAINTIFF,
vs.
CHARLES F. KRING, DEFENDANT. } 43. On indictment for murder, first degree.

This day comes defendant, by his attorney, and files his bill of exceptions herein as follows, to wit:

Bill of exceptions.

In the criminal court of the city of St. Louis, May term, A. D. 1881.

STATE OF MISSOURI, PLAINTIFF,
vs.
CHARLES F. KRING, DEFENDANT.

155 Be it remembered that on the trial of this cause in the St. Louis criminal court, at the May term thereof, A. D. 1881, the following proceedings were had, to wit:

TUESDAY, *May* 10, 1881.

Now, this cause coming on to be heard before the Hon. G. H. Burckhartt, sole presiding judge of the second judicial circuit of the State of Missouri, duly appointed special judge of this court to try this cause under and by virtue of the order hereinbefore set forth.

Present, Hon. G. H. Burckhartt, judge; the defendant, Charles F. Kring, in his own proper person; Messrs. L. D. Seward, Presley N. Jones, and Daniel Hay, of counsel for the defendant; circuit attorney Joseph R. Harris and Mr. Charles F. Joy, representing the State.

Whereupon the following proceedings were had, to wit:

The defendant, by his counsel, filed his motion to set aside the order herein previously made overruling defendant's motion for a change of venue, as follows:

Motion to set aside order overruling motion for change of venue.

In the criminal court of the city of St. Louis and State of Missouri.

STATE OF MISSOURI
vs.
CHARLES F. KRING. } Murder; 1st degree.

156 Now comes Charles F. Kring, defendant in the above-entitled cause, by his attorneys, and moves the court to set aside the order overruling the defendant's application for a change of venue in the above-entitled cause made on the 29th day of November, A. D. 1880, because—

1. The legislature of the State of Missouri has, since such order was made, to wit, in the month of March, A. D. 1881, passed a law authorizing and allowing a change of venue from the city of St. Louis from the

same causes that a change of venue is allowed from the counties of this State.

2. Because the legislature of this State, in the month of March, 1881, repealed the law authorizing a special venire to summon a jury consisting of persons who reside in the county of St. Louis outside of the city of St. Louis, when it appears that the inhabitants of the city of St. Louis are prejudiced against the defendant.

3. Because since said defendant made such application for a change of venue the prejudice of the inhabitants has become greater than it was at the time such application was made.

4. Because he believes he cannot have a fair trial in the city of St. Louis on account of such prejudice of the inhabitants of said city of St. Louis.

157

L. D. SEWARD,
P. N. JONES,
DANIEL HAY,
Defendant's Attorneys.

Which motion, after argument heard from both sides of the case, was by the court overruled, to which ruling of the court counsel for defendant then and there duly excepted.

Whereupon, defendant by his attorneys filed his motion for a change of venue, as follows:

Motion for change of venue.

In the criminal court of the city of St. Louis, State of Missouri, at the May term, 1881.

STATE OF MISSOURI
vs.
CHARLES F. KRING. } Indictment for murder in the first degree.

Now, at this day comes Charles F. Kring, the defendant in the above-entitled cause, and states that the minds of the inhabitants of the city of St. Louis are so prejudiced against him that he cannot have a fair trial in the above-entitled cause in the said city of St. Louis, and he further states that the fact that the minds of the inhabitants of the said city of St. Louis were so prejudiced against him that he could not have a fair trial in the said city of St. Louis, in the above-entitled cause, first came to his

158 knowledge when he applied for a change of venue, in the month of November, A. D. 1880, that being the first and only application made by him for a change of venue; that since saidfirst application for a change of venue he has become more convinced of the existence of such prejudice in the minds of the inhabitants of the said city of St. Louis; that it will be absolutely impossible for him to get a fair trial in the said city of St. Louis; that a law has been passed by the legislature of this State repealing sec. 18 of the act establishing this court prohibiting a change of venue from the said city of St. Louis, and providing that a change of venue shall be granted on proper application and evidence.

The defendant therefore prays the court for a change of venue of the above-entitled cause to some county in this State.

(Signed) CHARLES F. KRING.

Sworn to and subscribed to before me this 10th day of May, 1881.

ANDREW J. CLALBY, *Clerk.*

The COURT. Is that all the affidavit?

159 Mr. SEWARD. We have some affidavits or we have witnesses here. I will state that there has never been until the first application of this defendant an application for change of venue in this city since this court was established, about 25 years ago, and I believe the practice in some parts of the State is support the application by affidavits, and in other parts by witnesses.

The COURT. Oral testimony—that is my practice.

Mr. SEWARD. We have witnesses here to support this motion.

Mr. HARRIS. If the court please, I object to this court entertaining this motion. It has been frequently decided by the supreme court of the State, and in one case going up, I think, from your honor's circuit very recently (the State vs. Brown), that in case of a motion of this kind the circuit attorney is entitled to notice. That fact must appear to the court—and that application when the case is called for trial come too late. There are quite a number of dicesions in the reports with reference to this.

The COURT. I don't think it is worth while to argue that question.

Mr. HARRIS. Let me see that application.

160 Mr. SEWARD. Do you want to make any further argument? Just wait till I look at this.

Mr. SEWARD. Upon that particular point there is no need of argument, the question is as to notice. I have endeavored, for three days past, to see Mr. Harris, and serve notice upon him. I enquired here, down at his office, down town, and been unable to do so. I believe the supreme court has held again and again that it is in the discretion of the court, when it thinks proper under the circumstances, to entertain a motion of this sort on the day of trial. There has been no session of court here since the order was made appointing your honor to try this case. This notice could not have been brought up before to-day, and I did not give the circuit attorney notice, for the reason I stated, which facts I am willing to verify by affidavit. We have no objection to his having all the time he desires to offer evidence in rebuttal; we simply desire to offer our evidence in support of this motion. As to the question of law whether we are entitled to it or not is, I think, very clear that we are. I thought we were even

161 before the act passed by the last legislature. Since that act, if that act is valid, there can be no question about it. * * * * *

[The rest of the argument has no bearing on the question of notice.—REPORTER].

The COURT. The application lacks one essential which your statement of facts does not justify the court in doing away with, and that is notice. There are cases in which no notice is necessary, but you urge no such state of facts. You have known and seen the order setting the case; you have known that the case would be so tried the day it came on for hearing, and you have given the prosecuting attorney no notice. It is proper the prosecuting attorney should have notice in order that he may have witnesses here. I cannot wait and delay the business of the court, at a heavy expense to the State, to get witnesses. If you were to allege that this came to your knowledge since the case is called for trial, that is notice. That is the effect of the supreme court decisions in this State.

Mr. SEWARD. You see our position with reference to this law?

The COURT. I understand. The law has been passed for some time.

162 Mr. SEWARD. And for that matter I am willing to make affidavit that I have been here at the circuit attorney's office every day for the past three days endeavoring to find the circuit attorney.

The COURT. It isn't worth while to go into any argument. If you had written out a notice and given it to the sheriff, and he had failed to find the prosecuting attorney, there would be some force in this argument; but that doesn't appear in your application. The application will have to be overruled. Any other motions you want to file?

Mr. SEWARD. If the court please, I will ask leave to withdraw that application.

Mr. HARRIS. I object to that; it is filed by his request.

The COURT. You will have to file a motion to set aside the order overruling, because it has gone beyond the power of the court to allow it to be withdrawn. I have overruled it. I think it is too late to do that after the court has passed on it. I suppose it is like a non-suit. After a cause is submitted to the court, and judgment rendered, you cannot take a non-suit. I suppose the same principle must apply here.

163 To which rulings of the court the defendant's counsel then and there duly excepted.

Whereupon defendant, by his counsel, filed the following motion to set aside the order of Judge Henry D. Laughlin, appointing Hon. G. H. Burckhartt to try this cause.

Motion to set aside order appointing G. H. Burckhartt.

In the criminal court of the city of St. Louis, State of Missouri.

STATE OF MISSOURI
vs.
CHARLES F. KRING. } In indictment for murder of 1st degree.

Now comes Charles F. Kring, defendant in the above-entitled cause, by his attorneys and moves the court to set aside and vacate the order made on the day of , setting the said cause down for trial on the 10th day of May, A. D. 1881, and designating, notifying, and requesting the Hon. G. H. Burckhartt, sole presiding and acting judge of the 2d judicial circuit of the State of Missouri, to appear on the said 10th day of May, of the May term, A. D. 1881, and try said cause of the State of Missouri vs. Charles F. Kring, because—

1. It is unauthorized by law and illegal.

164 2. It is provided by the law that when the judge of the St. Louis criminal court is disqualified or rendered incompetent by prejudice or from other cause that the case shall be transferred to the circuit court of the city of St. Louis.

3. The defendant has not had notice in time to prepare the case for trial.

L. D. SEWARD,
P. N. JONES,
DANIEL HAY,
Attorneys for Defendant.

Which motion was, after argument heard from both sides, by the court overruled, counsel for defendant then and there duly excepting to the ruling of the court.

Whereupon defendant, by his counsel, filed his motion to send the cause to the circuit court of the county of St. Louis, as follows:

Motion to send cause to circuit court of St. Louis County.

In the criminal court of the city of St. Louis, State of Missouri.

STATE OF MISSOURI
vs.
CHARLES F. KRING. } Indictment for murder of the first degree.

Now comes the defendant in the above-entitled cause, Charles
165 F. Kring, by his attorneys, and moves the court for an order that all the papers and proceedings be certified and transmitted to the circuit court of the city of St. Louis, State of Missouri, and to recognize the witnesses to appear at said court on the first day of the next term thereof, because it appears, from *of* the indictment in the said cause of The State of Missouri vs. Charles F. Kring, that the defendant was indicted by a grand jury summoned from the county of St. Louis, in the criminal court of St. Louis County, and does not appear that said cause was sent to this court on application for change of venue, and this court has no jurisdiction to try said cause.

L. D. SEWARD,
P. N. JONES,
DAN'L HAY,
Def't's Att'ys.

Which motion, after argument from both sides, was by the court overruled, counsel for defendant then and there excepting to the action of the court.

Whereupon defendant, by his counsel, filed his motion to quash the indictment found in this cause, as follows:

In the criminal court of the city of St. Louis, State of Missouri.

STATE OF MISSOURI
vs.
CHARLES F. KRING. } Indictment for murder of the first degree.

166 Now comes Charles F. Kring, defendant in the above-entitled cause, by his attornies, and moves the court to quash said indictment, because, 1, it appears from the face of said indictment that said indictment was presented by a grand jury summoned from the county of St. Louis in the criminal court of the city of St. Louis, and has not been sent to this court on a change of venue.

L. D. SEWARD,
R. N. JONES,
DANIEL HAY,
Defendant's Att'ys.

Which motion the court overruled without hearing argument, defendant's counsel then and there excepting to the ruling of the court.

Whereupon defendant, by his counsel, filed his motion to have said cause transferred to the circuit court of the city of St. Louis, as follows:

In the criminal court of the city of St. Louis, State of Missouri.

STATE OF MISSOURI
vs.
CHARLES F. KRING. } Indictment for murder of the first degree.

Now comes Charles F. Kring, defendant in the above-entitled cause, and whereas it appears that Henry D. Laughlin, judge of the St. Louis criminal court, is, by reason of certain affidavits heretofore filed in this cause, to wit, the affidavits of S. A. Pratt, Thos. E. Price, H. E. Campbell, and John W. Sutherland, filed on the day of , disqualified and incompetent to try said cause of the State of Missouri vs. Charles F. Kring, and moves the court to transfer said cause to the circuit court of the city of St. Louis, as provided by law.

L. D. SEWARD,
P. N. JONES, AND
DANIEL HAY,
Att'ys for Def't.

Which motion was by the court overruled, defendant's counsel duly excepting to the ruling of the cou't at the time. Whereupon court adjourned to Wednesday, May 11, 1881, at 10 a. m.

167 WEDNESDAY, *May* 11, 1881—10.12 a. m.

Court met pursuant to adjournment. Present as on yesterday. The following proceedings were had:

The State, by the circuit attorney, announced itself ready to try the case at bar.

The defense asked to have their witnesses called, which being done only one witness (John F. Carroll) answered.

Mr. SEWARD. If the court please, after the law passed by the legislature, Judge Laughlin called upon us to agree with the circuit attorney upon a judge to try the case, and we understood from him that he simply wanted us to intimate whom we desired, and we did so; we desired Judge Lindley; we went to Judge Laidley, and were informed by him that he would accept, but that he would not be able to try the case until some time in June. Afterwards we understood Judge Laughlin wanted something more than an intimation from us as to our preference; that he wanted an agreement in writing, which, for reasons then stated, we refused to enter into—refused to stipulate as to the judge to try the case. Then his honor Judge Laughlin, I think the last, or last day but one, of April set this case down for the 10th of this month (yesterday). I stated to him then that I thought the time was too short; that it would be impossible for us to be ready at

168 that time. We said then that would be for your honor, as the bill provided that the cause could be postponed from time to time as the emergency required, and then we had an understanding with the circuit attorney that if it would suit your honor to try this cause at any

time after the first week in June, that the case should be set down at that time. We learned that the circuit attorney was subpœnaing his witnesses; we issued our subpœnas, and they have been returned, some of them served and some of them not served. We understand the legal aspect of the case if this were an ordinary suit set in the regular order, but as it is we have with that short notice not had sufficient time to make preparation.

The COURT. I cannot take notice of any agreements. The only course when you are called for trial and are not ready is, as the statute says, to make the proper affidavit. If you have one and believe it to be true and the prosecuting attorney does not admit it, the case will be continued till such time as the court thinks proper.

Mr. SEWARD. I didn't think, under the circumstances, that an affidavit was necessary.

The COURT. No exception to it. If this was the first time after the grand jury came in with this indictment you would have to file that affidavit, unless the prosecuting attorney waived it. I will give you time to prepare it.

169 Mr. SEWARD. How much time?

The COURT. Until 2 o'clock.

Mr. SEWARD. We will have our affidavit ready by 2 o'clock.

The COURT. If the prosecuting attorney admits it you will have to go to trial.

Mr. SEWARD. Under these extraordinary circumstances?

The COURT. My practice is to have, in every case, these extraordinary circumstances embodied in the affidavit.

Recess till 2 p. m.

2.05 P. M. (same day).

Counsel for defendant explain to the court that they have been very diligent, but as yet have not completed the affidavit. Whereupon the court extends the time one hour.

Mr. SEWARD. We have not yet been served with any list of the jurors in this cause.

The COURT. That is just the trouble; when I get them qualified I will have to give them to you for 48 hours.

Mr. SEWARD. That is the tro'ble.

The COURT. If you have not been served with the list I will have to give you 48 hours after I qualify them.

Recess untill 3.30 p. m.

170 3.37 P. M.

Mr. JOY. If the court please, Mr. Seward is reading the affidavit over to Mr. Harris.

The COURT. Let me know when they get through.

Mr. HARRIS. I furnished counsel a portion of the testimony from which, I presume, a portion of this was prepared, and now it is missing.

Mr. SEWARD. I never looked at it; left it on the table—left it there. Where it is now I cannot tell.

The COURT. I don't see how it could have gotten out of the room. I would like you gentlemen to return those papers to the clerk.

Mr. SEWARD. I didn't look at it. I don't know what it was.
Mr. JONES. It is no portion of the records.

Whereupon defendant, by his counsel, filed his affidavit for a continuance of the case at bar, the same being as follows:

STATE OF MISSOURI)
vs.
CHARLES F. KRING.)

171 CITY OF ST. LOUIS, *ss:*

Charles F. Kring, the defendant in the above-entitled cause, being duly sworn upon his oath, says that he cannot safely proceed to trial in said cause at this term of court, on account of the absence of William Goeble, A. Saehugen and J. K. Knowles, who are competent, material, and important witnesses for the defendant in said cause.

Affi*davit* says that he expects to prove by said William Goeble that he, said Goeble, was acquainted with the defendant's family in Germany, and lived in Maschenheim, in the duchy of Hesse-Darmstadt, the place where the family of said defendant lived; that the said Goeble knew defendant' grandfather, grandmother, father, uncles, and aunts; that he attended the same school *until* defendant's father and uncles, at Maschenheim, in the duchy of Hesse-Darmstadt aforesaid; that he saw defendant's grandfather frequently fall down in fits of epilepsy, frothing at the mouth, having convulsions, and suffering from great nervous excitement, and would become unconscious and remain so for considerable time afterwards.

172 After these fits occurred he would and did suffer very great and intense nervous prostration; that said grandfather of defendant was a minister of the gospel by profession; that he would go into the streets, shouting that he was Jesus Christ, exhorting those he met to flee from the wrath to come, and that the day of judgment was near at hand; that on account of such fits and delusion that he was Jesus Christ he was removed by the authorities of the church and compelled to resign his position; that after this he became incompetent to do any business, perform and labor, and finally sunk into a condition of deep melancholy and dementia; that the defendant herein strongly resembles his said grandfather as to color of hair, eyes, and facial conformation, and that the said grandfather of defendant was regarded by the community in which he lived as an insane person, and finally died insane at Hungen, Hesse-Darmstadt, Germany; that the uncle of said defendant, by name William Kring, when a young boy, was bright, studious, intelligent, and of a cheerful disposition, and so continued until he was about 16

173 years of age, when he was sent to college to prepare and be educated for the ministry. While at college his manners, actions, and conduct underwent a change. From being bright, studious, intelligent, cheerful, and quiet, he became stupid, dull, and at times violent in his actions, and unable to learn, and his relations were compelled to take him from college and place him in an insane asylum, where he remained for a number of years. Afterwards his mental condition was improved, and he was removed from said asylum, and afterwards came to the United States and committed suicide by throwing himself into the Atlantic Ocean; that

another uncle of defendant—Otmer Kring by name—when a young man at school was fairly bright, studious, gentle, and intelligent; that, as time rolled on, his manners, actions, and conduct underwent a change. He gradually became morose, stupid, and dull; that he became affected with delusions, and imagined without any cause or reason that the citizens of the town where he lived were joined in a conspiracy to kill him; that his thoughts, actions, and feelings were ever afterwards characterized
174 by peculiarities and eccentricities. That defendant's father—Fritz Kring—when a boy, was bright, cheerful, sociable, pleasant, and quiet; that when about 14 or 15 years of age he was sent to college, and that in time he became morose, unsociable, and subject to fits of violence and passion without cause; that his relatives were advised by his teachers to take him from school, which they did. That said William Goebel was in attendance upon this court at the December term, A. D. 1880, of this court, when the cause was last called for trial; that at that time he resided on Third street, between Elm and Spruce, in the city of St. Louis, State of Mo.; that defendant's attorneys caused a subpœna to issue on the 6th day of May, 1881, A. D., and immediately placed the same in the hands of the sheriff of said city of St. Louis, State of Missouri, to be served, and placed the witnesses' address upon the back of said subpœna, and gave the sheriff directions as to where the witness resided, and where they believed and understood he resided at that time, to wit, the 6th day of May,
175 A. D. 1881; said witness resided when this case was last called for trial, to wit, December term, A. D. 1880, and where the said witness was seen only a few days prior to the time of issuing said subpœna. Affidavit further states that said subpœna has been returned "not found." Furthermore, although efforts have been made within the last couple of days by defendant's attorneys to find said witness they have failed to do so; they have been informed and now believe that said witness Goebel has lately removed to another portion of the city, viz, the southern portion thereof, and that since the calling of the case, on May 10, 1881, they have been unable to ascertain the exact location and whereabouts of said witness, but believe that they can ascertain the same and have said witness in court if granted a continuance to the next term of court. Affidavit further states that there is no other witness or witnesses within reach of the process of this court who will prove the facts that said Goebel will prove, and upon whom the defendant can safely rely to prove the same. Affidavit further states that said witness is not absent by his consent,
176 procurement, or connivance, and that this application is not made for vexation and delay, but to obtain substantial justice.

That affiant expects to prove by said Dr. J. K. Knowles that said Dr. J. K. Knowles knew the defendant was residing Du Quoin, Illinois, in 1867; that at that time defendant was a single man and kept drug store in said Du Quoin; that said Dr. J. K. Knowles noticed his strange actions and ceased sending prescriptions to defendant's store to be filled, and that defendant was forced to abandon his business by reason of mental derangement; that said Knowles witnessed during the time he knew defendant frequently suffering from epileptic fits; saw him thrown into spasms, frothing at his mouth, becoming rigid in his muscles, and at times being thrown into violent convulsions, which would last for some time; that he was once called to the bedside of defendant, whom said Knowles found with

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several wounds on his head and bruises on his body, for which defendant could give no explanation as to their origin other than that he had taken
177 a walk into the country and finally found himself wou'did in his hotel; that the business seemed to have originated by a fall while in an epileptic fit; that defendant, after such fits, became prostrated by weakness, which was generally followed by a state of melancholy for hours or days; that during one of these spells of melancholy and despondency defendant took a dose of st'ychnine with suicidal intent, and was attended by one Dr. Berthold Hahn and said Knowles, and by vigorous treatment defendant's life was saved; that he frequently saw defendant walking in the streets in an aimless sort of way, sometimes in day, sometimes late at night; he would not respond to his friends who greeted him, and would refuse to go into the house, which actions were the effects of mental derangement; that he frequently would suspect his best friends of injuring him and constantly complained about the treatment he received at the hands of his friends and relatives; that in December, 1874, while said Dr. Knowles was living in Madison County, Illinois, from which point he had frequently corresponded with defendant and received
178 sometimes replies from defendant which at times would be rational and at other times irrational; that the week between Christmas, 1874, and New Year, 1875, defendant came to the house of Dr. Knowles late in the evening, all muddy, and laboring under a terrible excitement; that defendant requested to be sheltered, and said he had killed, in St. Louis, Mo., a man by name of Broemser; that the defendant looked wild and unnatural at the time; that a room was given him, and that during the night defendant had a violent epileptic fit; that said Knowles inquired next morning, by telegraph, whether such a murder had been committed in St. Louis, and was informed there had not been; that he advised defendant to go home to his friends; the defendant replied that his friends had forsaken him; that before the first trial of this cause in this court said Dr. Knowles left this country and returned to England, where he remained until the fall of 1880, when he returned to Illinois, locating near Alton, Ills., his old home; that said Dr. J. K. Knowles was in
179 *was in* attendance upon the court at the December , A. D. 1880, thereof, when this cause was last called for trial, and was continued by the court without the consent of defendant or his attorney; said court then remarking that said cause was "in a rut" and could not be tried until legislation was had thereon. That as soon as defendant was informed and learned such legislation was had he, affiant, began to procure the attendance of said Knowles; that he then learned for the first time that said Knowles had removed from Illinois and within the last few days first learned that his present residence is Elkhorn, Indiana, too late to procure the attendance of said witness at this term and too late to take his deposition in this cause for this term; that if [he] had had until June to have prepared for trial, as he was assured he would have, he would have had the deposition of said witness or his presence; that affiant knows of no other witness by whom he can prove the above facts; that said
180 witness is not absent by consent, procurement, or connivance of defendant; that if this cause is continued affiant can by next term obtain the evidence of said witness; that this aff't is not made for delay, but that justice may [be] done.

Affiant further states that he expects to prove by said A. Doehugen that he knew defendant in Mud Creek, State of Illinois, in the year of 1873, where the defendant kept a drug store; that said Soehugen will show that the defendant was insane at that time; that defendant after imagined and believed without any cause that his father was dead, when such was not the fact at all; said witness will also prove that defendant was seized with an epileptic fit in 1873 in Mud Creek, Illinois; he fell down in his drug store, frothed at the mouth, struggled in convulsions, and afterwards was unconscious for several hours, accompanied by great nervous prostration; said Soehugen will also show that about three weeks previous to the
181 homicide defendant came to his (Soehugen's) house, looking like a tramp, covered with dirt and mud, and asked to be allowed to remain a few days. Defendant stated that the woman, Mrs. Broemser, was following him. He said he could not get her out of his mind; she was after him, and he could not escape. Witness allowed defendant to remain at his house three or four days. During the time that defendant remained with *with* witness he had a fit, fell down on the floor, and had a severe nervous condition of a very grave character. His color changed, and the saliva flowed from his mouth. When the convulsion passed off he was prostrated entirely, and remained seemingly unconscious for a number of hours. Said witness Soehugen will show and prove that the defendant at this time was insane, and never was anything else but insane. Witness had known defendant for a number of years, and will also show that the defendant was swayed and controlled by insanity of worst type, connected with a consuming love for Mrs. Broemser, the de-
182 ceased. That said A. Soehugen is a competent, material, and important witness for defendant in said cause; that he knows of no other witness on whom he can safely rely to prove the facts he expects to prove by said witness; that said witness A. Soehugen was present in court when this cause was last tried, and was present when the cause was last set down for trial, to wit, in December, A. D. 1880; that he resides No. 1911 Lynn street, in the city of St. Louis, State of Missouri; that defendant's counsel caused a subpœna to be issued for such witness, and placed in the hands of the sheriff on the 6th day of May, 1881, and placed upon the subpœna the address of said witness; that said subpœna was returned "not found" by the sheriff, and defendant is informed that he is temporarily absent from the city of St. Louis; that he still resides at 1911 Lynn street, where his family now reside; that he will soon return, and that his absence is not procured by defendant or by any one for him, but on account of business for the St. Louis Gas Co., his employer. Affiant
183 further states that he believes he can procure the attendance of said witness at the next term of the court.

Affiant further states that he has been taken by surprise; that this cause was not set down for trial until 29th day of April, 1881; that it was agreed between his counsel and the circuit attorney that the cause should be tried in the month of June next, if it would suit the convenience of the court; and it was previously understood by this affiant that the Hon. James Lindley of this city, judge of the circuit court of this city, would be appointed to try this cause; that the said Judge Lindley informed his counsel and the circuit attorney that he would, if appointed, try the cause in the month of June.

Affiant further states that Chas. P. Johnson sen. counsel in the case, is absent on account of important professional engagements made when it was understood that this cause would be set down for trial in the month of June, and that he believes he cannot safely go to trial in the absence of his counsel, and that owing to the professional engagements made
184 aforesaid he will not be able to be present and conduct the trial of this cause, unless it is continued or postponed.

Affiant attaches hereto a copy of a letter written by the circuit attorney, wherein he expresses a willingness to have said cause postponed until the month of June.

(Signed) CHAS. P. KRING.

Sworn to and subscribed before me this 11th of May, A. D. 1881.
ANDREW J. CLABBY, *Clerk.*

Letter of J. R. Harris.

(Copy.)

ST. LOUIS, *May 2d*, 1881.

Hon. G. H. RUCKHARTT,
Presiding Judge 2d Jud. Circ't, Huntsville, Mo.:

DEAR SIR. Your letter expressing your willingness to try the case of the State vs. Kring, has been received with pleasure. There are several questions of law which I am informed will be raised by defendant's counsel, among others the validity of the order under which you are to act as special judge, and the question whether the indictment
185 having been by a grand jury of the county of St. Louis before the separation of the city from the county, can be tried by the criminal court of the city St. Louis. It was expected that this cause would be tried early in June, prior to the sickness of Judge Laughlin, and it may therefore be best under all the circumstances to dispose of any preliminary motions at the present setting, May 10, and then for you to set the cause for trial in June at such time after the first week as will suit your convenience.

These are simply suggestions, which, if they meet your approval, will meet the wishes of the State and the defendant, and probably bring this cause to a satisfactory ending. The State can in any event be ready at the 10th, but the defendant has not, as stated, expected to be tried earlier than June.

Very resp't'y,
(Signed) JAS. R. HARRIS.

To the granting of which motion for a continuance counsel for the State objected because the affadavit is insufficient under the statute and
186 under the rules of the court; because it does not appear that defendant's counsel have exercised due diligence to bring such absent witnesses into court; because the affidavit does not state that defendant believes the testimony expected, as stated to be given by said witnesses, to be true; and that the records of the court show defendant's alleged senior counsel, Chas. P. Johnson, to have withdrawn from the case in open court and by the court's permission. Whereupon the court denied defendant's

application for a continuance; defendant's counsel duly excepting at the time to such denial of defendant's prayer.

Mr. SEWARD. I ask leave to withdraw the affidavit and amend it. It will require only a moment's time. We were in great haste to get this prepared.

The COURT. The practice in my circuit does not permit the amending of an application for a continuance. I believe the supreme court has so held. Under very extraordinary circumstances I have done it, but I do not see any reason to do so in this case. The application for con-
187 tinuance is overruled, and we will proceed with the case.

To which refusal of the court to allow the defendant to amend his application for continuance, defendant's counsel then and there duly excepted.

The COURT. Gentlemen who are on the panel will come around and take their seats in the jury-box.

Mr. SEWARD. We are not furnished with a list.

The COURT. I will furnish you a list when qualified.

Mr. SEWARD. The practice here is the other way.

The COURT. Will you agree, if I give you a list this evening, that it shall count part of the 48 hours. That can be done under the law, I suppose. My practice has always been to qualify the men and then give you 48 hours. It may take a little longer time, but it is a practice preferable to the one which the supreme court recognises as correct.

Mr. SEWARD. We understand we are entitled to a list of 47 jurors and then 48 hours afterwards.

The COURT. Not both ways. I will give you a list this evening
188 and you can commence in the morning, if you consider it part of the 48 hours, and that is the law till the law is changed. Perhaps it would be best just to give them a list, and then you can commence empanelling a jury in the morning. We will not delay any time in doing that.

Mr. JOYES. I understand your honor is going to examine the various jurors, and then when you have obtained a proper number we will have 48 hours' notice.

The COURT. That is the way I understand the law. I can give it to you either way, but I think that is the better course.

Mr. SEWARD. We will wait until your honor examines the jurors.

The COURT. Come around then. Call twelve (to sheriff).

* * * * * * *

729 *Instructions to the jury.*

That upon the trial the court gave the jury the following instructions numbered 1–16, inclusive:

I. If the jury believe from the evidence that the defendant, Charles F. Kring, in the month of January, 1875, wilfully, deliberately, felon'ously, and premeditatedly, and of his malice aforethought, shot and killed Dora E. Broemser, in the city of St. Louis, then in the county of St. Louis, and State of Missouri, as charged in the indictment, then the jury should find him guilty of murder in the first degree, and if they so find they will merely so state in their verdict.

II. Feloniously means wickedly and unlawfully. The jury are in-

structed that wilfully means intentionally; that is, not accidentally. Deliberately means in a cool state of the blood; that is, not in the heat of passion, caused by lawful provocation. Premeditatedly means thought of beforehand; any length of time, however short. Malice is the intentional doing of a wrongful act. And the jury are further instructed that provocation to be sufficient to mitigate or extenuate homicide, as applicable to this case, should amount to personal violence or injury to
730 the defendant. Mere words, however gr'eavous they may be, are no provocation sufficient to free the party killing from the guilt of murder.

III. It devolves upon the State to prove every fact necessary to constitute defendant's guilt of the crime charged, beyond a reasonable doubt, before you can convict. Such doubt must be a substantial doubt of defendant's guilt arising from the evidence, and not a mere possibility of his innocence, and if you have a reasonable doubt, as defined above, of defendant's guilt you must acquit; but if you are satisfied of defendant's guilt beyond a reasonable doubt, you must convict, unless he has established by the evidence to your reasonable satisfaction that at the time he committed the act he was insane as defined in the instructions.

IV. The jury are the sole and exclusive judges of the weight of testimony and the credibility of all witnesses, and of the truthfulness of their respective statements, and in examining the testimony of the various witnesses they are at liberty, if they find that any witness has knowingly sworn falsely to any *to any* material fact in *in* the cause, to discredit and reject the whole or any part of the testimony of such witness.

731 V. The opinions of the medical experts upon the question of the insanity of the defendant are testimony which the jury should consider and examine in connection with all the other testimony in the cause, subject to the same rules of credit or disbelief as the testimony of other witnesses. The opinions neither establish nor attempt to establish the truth of the facts upon which they are based; whether the matter testified to by the witnesses in the cause as facts are true or false, is to be determined by the jury alone; neither are the hypothetical questions put to the medical experts by the counsel in the cause evidence of the truth of the matters stated in these questions.

VI. The law presumes every man to be sane until the contrary is established by evidence to the reasonable satisfaction of the jury, and when insanity in any form is set up as a defence, it is a fact which must be proved like any other fact, and the burden of proving such insanity is upon the defendant and he is required to establish such insanity to the reasonable satisfaction of the jury.

VII. The jury are instructed that if the evidence shows merely that the defendant might have been insane at the time of the killing,
732 but does not show satisfactorily to their minds that the defendant was insane at the time of the killing, this is not sufficient to warrant an acquit'al on that ground.

VIII. The deliberation and premeditation necessary to constitute murder in the first degree, may be inferred from the facts and circumstances connected with the killing, and if such deliberation and premeditation existed for a moment, as well as for an hour or a day before the killing, it is sufficient.

IX. To constitute the plea of insanity a good defense, the jury must believe and find from the evidence that the defendant, Kring, was so far insane at the time of the killing as not to be capable of knowing that the act committed was criminal.

X. To constitute insanity a good defence in this case the jury must find from the evidence that defendant, at the time of committing the offence charged in the indictment, was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, such as not to know he was doing wrong.

733 XI. The term insanity as used in this defence means such a perverted and deranged condition of the mental and moral faculties as renders a person incapable of distinguishing between right and wrong, and makes him unconscious at times of the nature of the act he is about to commit. Such insanity, if proved to the reasonable satisfaction of the jury to have existed at the time of the commission of the act, is in law an excuse for it, however brutal and cruel it may have been.

XII. Although the jury may believe and find from the evidence that the defendant did commit the act charged against him, yet if they further find that at the time he did so he was in such an insane condition of mind that he could not distinguish between right and wrong, then such act was not malicious, and the jury should acquit him of the crime charged on the ground of insanity, and so state in their verdict.

XIII. To establish his insanity positive or direct testimony is not required. Circumstantial evidence which reasonably satisfies the minds of the jury that the defendant was at the time the alleged shooting was done incapable of distinguishing between right and wrong, and comprehending the nature of the act, will be sufficient.

734 XIV. The law does not require that the insanity which absolves from crime should exist for any definite period, but only that it existed at the time when the act was done with which the defendant stands charged.

XV. It is not necessary in order to acquit the defendant on the ground of insanity that it should appear from the evidence that there was such a permanent derangement and abnormal condition of the mind as to render him incapable of reasoning on some subjects with precision and forming correct conclusions, but it must appear to your reasonable satisfaction from the evidence that there was such a disorder of the mind as rendered him incapable at the time of committing the act of distinguishing between the right and wrong of the act he was about to commit.

XVI. In determining the sanity or insanity of the defendant the jury will take into consideration all the facts and circumstances admitted in evidence, and if from the whole evidence they are reasonably satisfied that at the time the defendant committed the act charged against him
735 in the indictment he was not in a state of mind, by reason of disease thereof, to distinguish between right and wrong, they will acquit him on the ground of insanity.

To the giving of which the defendant then and there excepted. After which, and *and* at the proper time, the defendant asked the following instructions, numbered 1 to 8, as follows:

Defendant's instructions.

1. That in determining the sanity or insanity of the defendant in this case they are to take into consideration all the facts and circumstances admitted in evidence, and if they believe from the whole evidence at the time the defendant committed the act charged in the indictment he was not in a state of mind by reason of disease thereby to comprehend his relations to other persons, the nature of the act committed, and its criminal character as against the laws of the land, they must find him not guilty.

2. That although the jury may believe from the preponderence of the evidence that defendant is guilty as charged in the indictment,
736 they are instructed that this is not sufficient to convict; but if, from all the facts and circumstances given in evidence, they have a reasonable doubt of any fact necessary to constitute defendant's guilt they must give the defendant the benefit of that doubt and acquit. But such doubt to justify an acquit'al must be a substantial doubt, and not a mere possibility of defendant's innocence.

3. The jury are instructed that the statements read in evidence by the defense, and as for the evidence of Dr. Schlemitzauer is admitted by the State to be what said witness would testify to if he were personally present in court and testifying, and the jury are further instructed that they are to give the same weight and credit to these statements as if said witness was personally present in court, and had testified the facts therein set out.

4. That the law in this State permits a defendant in such case as this to take the depositions of witnesses and read the same upon the trial of the cause as evidence, and that in this case you will give to each and
737 every deposition read the same weight and consideration that you would were the witnesses personally present in court testifying, and the fact that they are depositions should in no manner impair or impeach their truth and validity.

5. That if, from the whole evidence, the jury believes the defendant committed the act, but at the time of doing so was under the influence of a diseased mind, and was really unconscious that he was committing a crime, he is not in law guilty, and you should defendant not guilty. The law does not require that the insanity which absolves from crime should exist for any definite period, but only that it existed at the moment when the act was done with which the defendant stands charged.

6. Insane means not sane, or not of sound mind, and it not necessary in a plea of insanity that the defense should prove such a permanent derangement and abnormal condition of the mental faculties as to render the person incapable of reasoning upon some subjects with precision, and forming proper conclusions thereon, but such a disorder of the reason at
738 the time of committing the act as rendered him incapable to perceive the right, and unconscious of committing a wrong, or that he was irresistably impelled by insane impulse—that he had not the will-power to resist that impulse, control his action, and choose between right and wrong.

7. The jury are instructed that in regard to the degree of insanity necessary to exempt an individual from responsibility from criminal acts the law is that his mind must have been so far impaired or destroyed that he was unconscious at the time of committing the act that it was wrong and

that he ought not to do it, or he must have been so irresistably impelled to the commission of the act by insane impulse that he had not the will-power to resist that impulse, to control his action, and cho'se between right and wrong.

8. That if you find from the evidence that *that* the defendant was insane at any time prior to that of the alleged commission of the act of homocide, the law in such cases presumes the continuance of that until a lucid interval *interval* or a restoration to reason is shown.

739 Which the court refused, to which ruling of the court the defendant then and there excepted; whereupon the jury returned the following verdict:

Verdict.

STATE OF MISSOURI
vs.
CHARLES F. KRING. } Charged with murder in the first degree.

We, the jury in the above entitled cause, find the defendant, Charles F. Kring, guilty of murder in the first degree, as charged in the indictment.

EDWARD P. FOX,
Foreman.

Thereupon the defendant files a motion to set aside the verdict, and for a new trial, in the following words, to wit:

Motion to set aside.

In the criminal court of the city of St. Louis, State of Missouri, May term, A. D. 1881.

STATE OF MISSOURI
vs.
CHARLES F. KRING. } Indictment for murder of the 1st degree.

Now comes Charles F. Kring, the said defendant, in his own proper person and by Charles P. Johnson, L. D. Seward, Presley N. Jones, and Daniel Hay, his attorneys, and moves the court to set aside the verdict of the jury herein rendered, and for a new trial in this cause, for the following reasons:

Motion for new trial.

1st. Because the court erred in setting aside, on its own motion, defendant's plea of guilty of murder of the second degree, previously
740 pleaded by him and accepted by the court, and entering a plea of not guilty of murder of the first degree, without the consent of defendant, or his attorneys.

2. Because the court erred in overruling defendant's motion for a change of venue, filed November, 1880.

3. Because the court erred in discharging the jury summoned from St. Louis County, to try the cause, and continuing the cause without the consent of the defendant or his attorneys, in December, 1880.

4. Because the court erred in erroneously citing defendant's attorneys to appear before the bar of the criminal court and show cause why they should not be disbanded, and thereby intimidating and preventing them from properly representing defendant, and also thereby greatly prejudicing defendants cause.

5. Because the court erred in making an order designating, appointing the Hon. G. H. Burckhartt to try the cause.

6. Because the court erred in overruling defendant's motion to set aside and vacate the order appointing Hon. G. H. Burckhartt to try the cause.

7. Because the court erred in overruling defendant's motion to have the cause sent to the circuit court of the city of St. Louis, it appear-
741 ing from the record of this case that Henry D. Laughlin, the regular judge of this court, was disqualified and incompetent to try the cause by reason of affidavits previously filed.

8. Because the court erred in overruling defendant's motion to quash the indictment.

9. Because the court erred in overruling defendant's motion to set aside the order overruling defendant's application for a change of venue.

10. Because the court erred in overruling defendant's motion for a change of venue on account of the prejudice of the inhabitants of the city of St. Louis.

11. Because the court erred in overruling defendant's application for a continuance, based on the absence of material, competent, and important witnesses; also on account of surprise, the court having intimated that the case would not be tried until June and was afterwards set down for trial on the 10th of May; also on account of an agreement between the circuit attorney and defendant's counsel that the cause should be tried in June.

12. Because it appears from the record that the cause was not
742 tried by the regular judge of the court, and there is no certificate or other competent evidence on file to show that the cause was tried by the judge appointed and requested by the regular judge of the court to try the cause.

13. Because the defendant's attorneys requested a list of 47 jurors summoned by the sheriff to try the cause 48 hours before the trial, and neither defendant or his attornies were furnished a list of 47 jurors summoned by the sheriff 48 hours before the trial of said cause.

Because 100 jurors from which defendant was compelled to select jurors to try said cause were drawn by the jury commissioner of the city of St. Louis and summoned by the sheriff of the city of St. Louis in obedience to an order made by Henry D. Laughlin, regular judge of this court, subsequent to the time that the said Henry D. Laughlin, regular judge of this court, was disqualified and rendered incompetent to try the cause by reason of the affidavits of prejudice previously filed.

14. Because the circuit attorney misrepresented the law and the evidence in his closing arguments to the jury.

743 15. Because the facts alleged as grounds of the application for a change of venue were within the knowledge of the court or judge, and he did not order a removal of the cause.

Because the verdict is against the law.

Because the verdict is against the evidence and the weight thereof.

Because the verdict is against both the law and the evidence.

Because the court gave improper and illegal instructions to the jury.

Because the court refused to give proper and legal instructions offered by defendant.

Because the court admitted improper and illegal evidence against the objection of the defendant.

Because the court refused proper and legal evidence offered by defendant.

Because the court illegally and improperly refused to sustain the challenges for cause of the defendant made in the empannelling of the jury.

Because the court erred in refusing to defendant's counsel the right to ask and have answered by the jurors legal and proper questions propounded in regard to the qualifications of said jurors.

744

CHAS. P. JOHNSON,
L. D. SEWARD,
P. N. JONES,
DAN'L HAY,
Def't's Att'ys.

Which motion for a new trial having been heard and considered was by the court overruled; to which decision of the court in overruling said motion for a new trial the defendant at the time excepted.

Thereupon the defendant filed a motion in arrest of judgment, in the following words, to wit:

Motion in arrest.

In the criminal court of the city of St. Louis, State of Missouri, May term, 1881.

STATE OF MISSOURI
vs.
CHAS. F. KRING. } Indictment for murder in the first degree.

Now comes the said Charles F. Kring, by Chas. P. Johnson, L. D. Seward, P. N. Jones, and Dan'l Hay, his attorneys, and move' the court to arrest the judgment in this cause, for the following reasons:

1. The indictment was not presented by a grand jury summoned from the city of St. Louis, but by a grand jury summoned from the county of St. Louis, as appears from the face of the indictment.

2. Because the plea of guilty of murder of the second degree
745 pleaded by defendant to said indictment, and accepted by the court, was never withdrawn by defendant or by his attorneys, or by the consent of the defendant, or by the consent of his attorneys.

3. Because the cause should have been sent to the circuit court of the city of St. Louis, and the judge who tried the cause had no authority in law to try the cause.

CHAS. P. JOHNSON,
L. D. SEWARD,
P. N. JONES,
DAN'L HAY,
Def't's Att'ys.

Which motion, in arrest of judgment, the court considered and overruled; to which decision of the court in overruling the motion in arrest of judgment defendant then and there excepted.

Thereupon it was stipulated and agreed by and between the circuit att'y and counsel for defendant that defendant should until the 20 day of June, 1881, to file his bill of exceptions, which stipulation is as follows:

STATE OF MISSOURI }
vs.
CHARLES F. KRING. }

746 It is stipulated and agreed by and between Joseph R. Harris, circuit att'y, and Chas. P. Johnson, L. D. Seward, P. N. Jones, and Dan'l Hay, attorneys for defendant, that the defendant may have an extension of time until the 20' day of June, 1881, to file a bill of exceptions in the above-entitled cause.

JOS. R. HARRIS,
Circuit Att'y.

Thereupon it was stipulated and agreed by and between the circuit attorney and the defendant's counsel that defendant could have until the 30th of June, 1881, to file bill of exceptions, as follows:

STATE OF MISSOURI }
vs.
CHARLES F. KRING. }

It is agreed and stipulated between the circuit attorney and the attorneys for defendant that the time for filing the bill of exceptions shall be continued and extended for ten days from this date, June 20th, 1881.

P. N. JONES,
Of Counsel for Def't.
CHAS. F. JOY AND
JOS. R. HARRIS,
Att'ys for State, of Record.

Bill of exceptions filed.

And thereupon defendant, by his counsel, presented this his bill of exceptions and prayed that the same may be signed and sealed and
747 made a part of the record of this cause, which is done accordingly this 29th day of June, A. D. 1881.

G. H. BURCKHARTT,
Judge of 2nd Judicial Circuit and Acting Judge of St. Louis Criminal Court in the above cause.

STATE OF MISSOURI,
City of St. Louis, ss:

I, Andrew J. Clubby, clerk of the St. Louis criminal court, certify the foregoing to be a full, true, and complete transcript of the record and proceedings in a cause wherein the State of Missouri is plaintiff and Charles F. Kring, defendant, as fully as the same appears of record, and on file in my office.

Witness my hand with the seal of said court hereto affixed at office, in the city of St. Louis, this 1st day of July, A. D. 1881.

[SEAL.] ANDREW J. CLUBBY,
Clerk of the St. Louis Criminal Court.

And afterwards, at the October term, A. D. 1881, of the St. Louis court of appeals, the following judgment was rendered in said cause, to wit:

748 *Judgment in c'rt of appeals.*

TUESDAY, *October 18th*, 1881.

STATE OF MISSOURI, RESPONDENT, *vs.* CHARLES F. KRING, AP'ELLANT. } Appeal from the St. Louis criminal court.

Now again comes the parties aforesaid by their respective attorneys, and the court being now sufficiently advised of and concerning the premises, do the consider and adjudge that the judgment rendered herein by the said St. Louis criminal court, be in all things affirmed, and stand in full force and effect, and that the said respondent recover of the said appellant his costs and charges herein expended, and have execution therefor.

Opinion filed.

Which opinion is in the words and figures following, to wit:

STATE OF MISSOURI, RESPONDENT, *vs.* CHARLES F. KRING, APPELLANT. } Appeal from the St. Louis criminal court.

Defendant was indicted at the March term, 1875, of the St. Louis criminal court for the murder of Dora C. Boemser. He was convicted of murder in the first degree, and the judgment was reversed on appeal.
749 Two mistrials were then had. At the October term, 1879, defendant pleaded guilty to murder in the second degree, and was sentenced to imprisonment in the penitentiary for twenty-five years. On appeal this sentence was reversed, and the cause remanded. At the May term, 1881, defendant was again convicted of murder in the first degree, and this appeal is from the judgment entered upon that conviction.

It appears from the evidence that on 4th of January, 1875, Dora C. Broemser was a married woman of respectability, living in the city of St. Louis with her husband; that about eight o'clock in the evening of that day defendant Kring appeared in the alley in the rear of the residence of Mrs. Broemser, and sent up word to her in the house that he wanted to see her. She sent back word that unless he went away she would send her husband to him. He replied that she knew her husband was out of town, and that if she did not come down he would come up-stairs. She then came down to him in the alley, accompanied by her sister-in-law. Defendant then told Mrs. Broemser that he wanted her to marry him. She said that she had a husband and children, and could not do so. He
750 said he must have an immediate answer. She told him she was

afraid he would shoot her. He said he was not armed, and required her to say whether she would go with him. She said, "No," and started to run. Kring then fired at her twice; one shot struck her in the leg; the second penetrated the back below the shoulder-blade. The pistol showed that it had missed fire at the third chamber, and Mrs. Broemser states in her dying declaration that as she was lying on the ground she put the pistol to her mouth and drew the trigger, but the pistol missed fire. A few days afterwards Mrs. Broemser was delivered of a child, three months before the term, which died before its mother, and on the 16th of January Mrs. Broemser herself died from the effects of the wounds inflicted by Kring.

The defense was insanity. This defense was not established to the satisfaction of the jury.

1. The grand jury which presented the indictment was taken from the body of St. Louis County before the separation of the city and county, and the cause was tried by the criminal court of the city of St. Louis
751 after that se'ration was effected by the adoption of the scheme and charter, and after the jurisdiction of the St. Louis criminal court had been restricted to the city of St. Louis.

We see no error in this. The grand jury which returned the bill was summoned from the body of the county, or political subdivision of the State, in which the offense was committed. The bill was returned to the St. Louis criminal court, the court in which defendant was tried. It is not pretended that the time of the indictment and the time the trial, this St. Louis criminal court had not jurisdiction over offenses committed within that city. We know of no principle of law which should lead us to declare that, because a territory lying outside of the district within which this offense was committed, has since the commission of the offense been withdrawn from the jurisdiction of the St. Louis criminal court, therefore this indictment, good at the time, has become bad. But if no ground exists for quashing the indictment, the cause is undoubtedly to be tried on the indictment and by the court to which the indictment was returned, and which had then, ever since has had, and still has, exclusive original jurisdiction of the cause of murder committed, as in this case, within the corporate limits of the city of St. Louis, those limits not having
752 been restricted in the mean time and the place of the homocide having been, ever since the creation of the St. Louis criminal court, within the territorial limits of its jurisdiction. The objection that the indictment was found in one county, and the trial had in a court *in* that has lost jurisdiction over that county, seems to be a play upon words. The indictment was found in a political subdivision of the State over which the court to which it was returned had then jurisdiction and within which the offense was committed; and the court remaining the same court the offense is tried in that court which has never lost jurisdiction over the territory within which the offense was committed, that territory being from first to last a part of the political subdivision of the State within which the offense was committed, the indictment found, and the trial had.

2. We see no error in the action of the trial court in overruling the motion for a change of venue. Eleven witnesses, including three of the counsel for appellant, testified in support of the motion that they did not think that defendant could have a fair trial in the city of St. Louis. The

contention seems to be, that because there was no cross-examination and because no witnesses were examined in rebuttal, the trial court ought to grant the motion.

753 We think that unless facts and circumstances appeared to the satisfaction of the court establishing the conclusion, the application was probably refused. The belief of the witnesses imposed no obligation upon the court. The judge of the St. Louis criminal court must be supposed to have his own knowledge of the temper of the community of which he is a member, in which he resides, and by which he is chosen for the important office that he holds. The jury list, as I learn from inquiry of the jury commissioner, is composed of over thirty-two thousand names; many of the men on the list are coming and going. The homocide in question was committed more than six years before this last trial. It would be strange if in so large a list many names could not be found of men who had never heard of the case, or who had no recollection as to reports current when the event was fresh, and who knew nothing as to comments, in the newspapers or otherwise, upon the homocide. We ought not to interfere unless we are satisfied that injustice was done by refusing the application, and inasmuch as the record shows, as a matter of fact, that a jury was without difficulty empannelled of men who had hardly heard of the case, and who had no improper prejudice or bias,

754 we see no good ground of interference in this respect. The statutory provision now in force is not that under consideration in Freligh State (8 Mo., 610). Under the old statute (R. S., 1835, § 17) it was held that there was no discretion, that where the requirements of the act were complied with, the change must be granted, and the statutory provision is to that effect in some States, but in most of the States of the Union, and in Missouri, the matter is one of sound judicial discretion (State vs. O'Rouke, 55 Mo., 440). In Missouri the exercise of that discretion is subject to revission and appeal; but it should clearly appear that there has been an abuse (State vs. Guy, 69 Mo., 432).

3. At the October term, 1879, defendant being charged with murder in the first degree, had, with the consent of the prosecuting attorney, entered a plea of guilty of murder in the second degree, and was thereupon sentenced to imprisonment in the penitentiary for twenty-five years. After this sentence he filed a motion to set aside the judgment, accompanied by affidavits, tending to show that he had entered his plea upon an understanding with the circuit attorney that his punishment should not exceed ten years. On appeal to the Supreme Court it was deter-

755 mined that the trial court should have permitted defendant to withdraw the plea of guilty of murder in the second degree and to enter the plea of not guilty (State vs. Kring, 71 Mo., 551).

When the mandate of the supreme court reversing the sentence and remanding the cause had been filed in the trial court, the defendant appeared in open court, accompanied by his counsel. Defendant was asked by the court if he desired to withdraw his plea of guilty of murder in the second degree and to re-enter his plea of no' guilty of murder of the first degree. To which the defendant replied, "No, sir; I desire to withdraw no plea. I stand by the agreement made between the circuit attorney and myself." To which one of defendant's counsel added, "As it is entered in the record of this case." The court said, "You take the position that the

agreement is valid and that the court is bound to carry it out." Defendant's counsel replied, "Yes, sir; defendant desires to stand by the plea of guilty of murder in the second degree in order that the court may meet out sentence." The court then asked counsel what they would do with the motion and affidavits. Counsel for defendant replied that they had subserved their purpose, and "did not cut any figure just now;" and counsel for defendant moved the court to sentence defendant under
756 his *his* plea of guilty of murder in the second degree. The court directed their motion to be putin writing. Counsel for defendant then suggested orally that the court correct its sentence under the agreement. The court then directed the motion to permit defendant to withdraw his plea of guilty of murder in the second degree and to enter his original plea of not guilty, to be put on the law docket, took the motion under advisement and continued it, and at the next term sustained the motion. The prisoner was again asked whether he desired to withdraw the plea of guilty and plead not guilty, but declined to say anything further. The court then set aside the plea of guilty of murder in the second degree, and the prisoner, being arraigned on the indictment, stood mute. Whereupon the court directed the plea of not guilty of murder in the first degree to be entered.

In this we see no error, but rather a compliance with the direction of the supreme court. The theory of counsel for defendant that a plea of guilty of murder in the second degree, regularly entered and received, precludes the State from afterwards prosecuting the defendant for murder in the first degree, is inconsistent with the ruling of the supreme court
757 in State vs. Kring (71 Mo., 551), and in State vs. Stephens (Ib., 535). The declarations of defendant that he would stand upon his plea already entered were all accompanied with a condition that the court should sentence him for a term not to exceed ten years, in accordance with an alleged agreement with the prosecuting attorney; which the court would not recognize. The prisoner did not stand upon his plea of guilty of murder in the second degree; he must, therefore, be taken to have withdrawn that plea, and, as he refused to plead, the court properly directed the plea of not guilty of murder in the first degree to be entered.

Formerly it was held in Missouri (State vs. Ross, 29 Mo., 32) that, when a conviction is had of murder in the second degree on an indictment charging murder in the first degree, if this be set aside, the defendant cannot again be tried for murder in the first degree. A change introduced by § 23 of art. 2 of the constitution of 1875 has abrogated this rule. On the oral argument something was said by counsel for the defendant to the effect that under the old rule defendant could not be put on his trial for murder in the first degree, and that he could not be affected by the change of the constitutional provision, the crime having been committed whilst the old constitution was in force. There is, however, nothing in
758 this, this change is a change not in crimes, but in criminal proceedure, and such changes are not ex post facto. (Gut vs. State, 9 Wall, 35; Cummings, Missouri, 4 Wall, 326.

4. At the November term, 1880, defendant filed his motion for a jury from St. Louis County on the ground of prejudice against him, on the part of the inhabitants of the city. This motion was overruled, but afterwards the court on reconsideration of the matter granted the mo-

tion. Three hundred jurors were summoned from the county at the request of counsel for defendant. When these jurors appeared, defendant challenged the array, on the ground that there was no warrant of law for summoning jurors residents of the county by the sheriff of the city. The challenge was overruled. Defendant then applied for a special judge, on the ground of prejudice in the mind of the judge of the criminal court. This motion was not then passed upon, but the court of its own motion discharged the jury, and continued the cause. The case was then continued from term to term until the March term 1881, when the court considering the affidavits as to the incompetency of the judge of the criminal court to try the cause and it appearing that
759 counsel could not agree upon an attorney possessing the qualifications of a judge to try the cause, or upon a special judge, the cause was continued, and Judge Burckhartt, of the second judicial circuit was appointed by the court to try the cause. This order was made on 27th April, 1881, in accordance with the provision of the act of 26 March, 1881. (Acts 1881, p. 120.)

The act in regard to the St. Louis criminal court (R. S., p. 1508–9, §§ 16, 17, 18) provided that in case of change of venue the cause should be sent to the circuit court of St. Louis County, and that no change of venue should be granted to another county, but a special venire should be issued to summon a jury from St. Louis County, outside of the city, if the affidavit set forth prejudice on the part of the inhabitants of the city. But by § 1999 of the R. S. of 1875, it was subsequently provided that the provisions of the criminal code applicable to the circuit court shall also be applicable to any court of record exercising criminal jurisdiction, in all cases where no other or different provision of law is made. Under the general provision of the criminal code (R. S., § 1878), a special judge may be selected from the members of the bar, but the act of 26th March, 1881, (acts, p. 120) provides that changes of venue shall be allowed from
760 the St. Louis criminal court, but that no special judge shall be selected from the members of the bar to set on account of the incompetency of the judge of the criminal court, but that, in case of his incompetency, the judge of the St. Louis criminal court may, by order of record, set down the cause for trial, and notify any judge of any circuit or criminal court in the State to try the cause, as was done in the present case. The order made seems to have been in all respects a compliance with the law of 26th March, 1881.

5. But it is contended that that law is unconstitutional. So far as the title of the act is concerned, it is not calculated to deceive, and fairly gives notice of the subject. Nor can it be said that the act connects incongruous subjects. (Luther vs. Saylor, 8 Mo. App., 424; State vs. Auberchon, ib., 325.) Nor can we see that a more general law could have been made applicable to the case. Laws advantageous to one locality and less applicable to the State at large, are held not come within the constitutional inhibition. Nor is the act a local or special law within the meaning of § 54 of article 10 of the constitution, any more than a law changing the terms of any circuit court of the State in a local or special law. The fact that the law relates to matters about which the people of the city
761 of St. Louis ar' specially concerned, does not make it a local law. The law operates in a single political subdivision of the State, but

it effects the rights of all the people therein. (State vs. Sheilds, 4 Mo. App., 259.) We do not see that the act violates any provision of the organic law of the State.

6. The application for a continuance seems to have been properly overruled, not complying with the statutory requirements in all respects. The ruling of the trial court in this matter is seldom interfered with. Certainly this conviction ought not to be reversed on any such grounds, unless it can be made to appear that defendant was injured by being deprived of the testimony of the absent witness. There is no ground whatever for suspecting anything of the kind in the present case.

7. This record shows that defendant's counsel were furnished with a list of 47 qualified jurors at 3 p. m. on Saturday, 15th May, and time given until 3.30 p. m. on the following Monday. The defendant was therefore furnished with as list of the jurors summoned in substantial compliance with the statute (R. S., § 1904).

8. Defendant complains that his counsel were not permitted to ask jurors as to their residence and business, or if they had a prejudice which would prevent their giving defendant a fair and impartial trial; and that
762 jurors were accepted who stated that they had formed and expressed an opinion as to defendant's guilt or innocence from reading the testimony of former trials in the newspapers. But there is no warrant in the record for these allegations. Nothing of the sort occurred on the trial, except that the trial court once sustained an objection to asking the occupation of a juror, but immediately afterwards withdrew the *the* ruling. If any man examined on his *on his* voir dire was not asked as to his business, it was because counsel chose not to put the question.

9. Counsel for defendant object to the dying declarations of Mrs. Dora Broemser, on the ground that it does not appe'r that she knew she was going to die when she made the statements. The truth is that the record shows with unmistakeable and rather unusual clearness that the woman knew at the time she made the statements in evidence that she could not possibly recover; that she knew that they were keeping the corpse of her baby to bury it with her; that she had no hope of recovery; that she expected to die within a day or two at the furthest, and that she said so at the time she made her dying declaration to her physician, who tes-
763 tified in regard to it. The declarations of Mrs. Broemser as to the circumstances of the homicide were made under a sense of impending death, and in the prospect of almost immediate dissolution. This appears not only from her own statement at the time, but from the opinion of her medical attendant, expressed to her, and on the witness stand, and from all the circumstances in the case.

The record has been examined with care, and nothing has been discovered to warrant a reversal of the judgment. It is therefore affirmed. All the judges concur.

R. A. BAKEWELL.

And afterwards, at the same term of said court, the following further proceedings were had in said cause, to wit:

WEDNESDAY, *Oct. 19th*, 1881.

STATE OF MISSOURI, RESPONDENT,
vs.
CHARLES F. KRING, APPELLANT.

Now, at this day, comes the said appellant, by his attorneys, and files his affidavit for an appeal herein, and on his motion an appeal is granted him to the supreme court of the State of Missouri from the judgment herein rendered.

Said affidavit for appeal is in the words and figures following, to wit:

Affidavit for appeal.

764 STATE OF MISSOURI, RESP.,
vs.
CHARLES F. KRING, APP. } October term, 1881.

STATE OF MISSOURI, *ss:*

Charles F. Kring, app., being duly sworn, makes oath and says that the appeal prayed for in the above-entitled cause is not made for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment or decision of the court.

CHARLES F. KRING.

Sworn to and subscribed before me this eighteenth day of October, A. D. 1881.

[SEAL.] ANDREW J. CLABBY,
Clerk St. Louis Criminal Court.

STATE OF MISSOURI, *ss:*

I, Joseph F. Baier, clerk of the St. Louis court of appeals, certify that the above and foregoing is a full, true, and complete transcript of the record and proceedings in the above-entitled cause as fully as the same remains of record and on file in my office.

In testimony whereof I hereto set my hand and affix the seal of said court, at office in the city of St. Louis, this 15th day of November, A. D. 1881.

JOS. F. BAIER, *Clerk.*

765 STATE OF MISSOURI, RESP.,
vs.
CHARLES F. KRING, DEF'T. } Application of Charles F. Kring for a stay of execution.

Upon the hearing of the application of the defendant and appellant, Charles F. Kring, for a stay of execution in this cause, I have so much doubt touching the premises as to render it expedient to take the judgment of the supreme court of this State thereon. I, the undersigned, do therefore expressly order and direct that the appeal herein in this behalf taken by the appellant aforesaid do operate as a stay of proceedings on the judgment and sentence rendered against him in this behalf by the St. Louis criminal court until this cause can be heard and determined in accordance with the usages and customs of the law by the supreme court of this State.

In token whereof I, the undersigned, do hereto set my hand, at the city of St. Louis, this the 14th day of July, A. D. 1881.

(Signed) T. A. SHERWOOD,
Chief Justice of the Supreme Court of the State of Missouri.

766 And afterwards, to wit, at the October term, 1881, of the supreme court of the State of Missouri, and on the 29th day of November, 1881, the following further proceedings were had in said cause, to wit:

STATE OF MISSOURI, RESP.,
vs.
CHAS. F. KRING, APP.

On motion of the attorney-general it is ordered by the court that above-entitled cause be docketed, advanced on the docket, and set for hearing on December 19th, 1881.

And afterwards, on the 19th day of December, A. D. 1881, the following further proceedings were had in said cause, to wit:

STATE OF MISSOURI, RESP.,
vs.
CHARLES F. KRING, APP.
Appeal from St. Louis court of appeals.

Now at this day come the parties by their attorneys, and, after argument herein, submit this cause to the court. Five days to parties to file additional brief.

And afterwards, on the 30th day of January, A. D. 1882, the following further proceedings were had in said cause, to wit:

767 STATE OF MISSOURI, RESPONDENT,
vs.
CHARLES F. KRING, APPELLANT.
Appeal from St. Louis court of appeals.

Now at this day come again the parties aforesaid by their respective attorneys, and the court being now sufficiently advised of and concerning the premises, do consider and adjudge that the judgment of the St. Louis court of appeals affirming the judgment of the St. Louis criminal court be in all things affirmed and stand in full force and effect.

And it is further considered and adjudged by the court that the said respondent recover against the said appellant its costs and charges herein expended, and have therefor execution. And it appearing to the court that the time fixed by the St. Louis criminal court in its judgment rendered herein for the execution of its sentence has passed, it is further considered, ordered, and adjudged by the court that the sentence of the St. Louis criminal court passed upon the said Charles F. Kring be carried into execution by the sheriff of the city of St. Louis on Friday, the 24th day of February, A. D. 1882, and that the clerk of the said criminal court issue a warrant to the sheriff of the city of St. Louis accordingly.

(Opinion filed.)

Which said opinion is in the words and figures as follows, to wit:

768 *Opinion of the court.*

THE STATE OF MISSOURI, RESP.,
vs.
CHARLES F. KRING, APP.

The defendant was indicted in the criminal court of St. Louis County, at its March term, 1875, for the murder of Dora C. Broemser.

He was tried and convicted at the November term of said court, 1875, but that judgment was reversed by this court, and the case is reported in 64 Mo., 591. Subsequently there were two mistrials, and the cause was continued from time to time until November 12, 1879, when, by consent of the circuit attorney and with leave of the court he withdrew his plea of not guilty and entered a plea of guilty of murder of the second degree, and was sentenced to imprisonment in the penitentiary for a term of twenty-five years. He thereupon asked leave of the court to withdraw his plea and to enter a plea of not guilty, alleging, as a ground for that motion, an agreement with the circuit attorney that if the plea of guilty of murder in the second degree was entered the punishment should be fixed at ten years' imprisonment in the penitentiary. The court overruled the motion. From the judgment he appealed to the court of appeals, by which it was affirmed, and, on appeal from that court to this, the judgment the court of appeals was reversed and the cause remanded to the criminal court.

The ground on which this court reversed the judgment was that defendant's plea of guilty was under "an agreement with the circuit attorney, apparently sanctioned by the judge of the criminal court, that the sentence should not exceed ten years' imprisonment in the penitentiary." (State vs. Kring, 71 Mo., 551.) When the mandate of the court was filed in the criminal court, defendant was asked by the court if he desired to withdraw his plea and plead not guilty, and answered that he did not, and his counsel moved the court to sentence him on that plea, which the court refused, and, in conformity with the decision of this court, sustained the motion previously made for leave to withdraw his plea of "guilty" and enter a plea of "not guilty." Subsequently defendant was brought into court and asked by the court if he desired to withdraw his plea, and his answer was, "I have nothing further to say." The court then made an order setting aside the plea, and defendant was arraigned and asked if guilty or not guilty, and replied, "I have no answer to make; I stand by the plea and the agreement." Whereupon the court ordered the clerk to enter for him a plea of "not guilty of murder of the first degree."

On the 26th of November, 1880, the defendant made an application to the criminal court for a change of venue on account of the prejudice of the inhabitants of the city of St. Louis, on which the court heard evidence and refused the application.

On the 15th of December, 1880, the defendant filed an application for a change of venue on account of the prejudice of the judge of the criminal court. The cause was continued from time to time until April 27, 1881, when the judge of the criminal court, on the application for a change of venue filed on the 15th of December, 1880, by order of court, appointed Judge George H. Burckhartt, judge of the second judicial circuit, to try

the cause, and set the trial for the 10th of May, 1881. The cause was then called for trial, and defendant's attorneys filed successively the following motions, which were all overruled: First, to set aside the order made by Judge Laughlin refusing defendant's application for a change of venue; second, a new motion for a change of venue; third, to set aside the order appointing Judge Burckhartt to try the cause; fourth, a motion to send the cause to the circuit court of St. Louis County; fifth, a motion to quash the indictment; sixth, a motion to transfer the cause to the circuit court of the city of St. Louis; and seventh, for a continuance of the cause.

A jury was then empanelled to try the cause, and a trial was had which resulted in the conviction of the defendant of murder in the first degree, which judgment was, on appeal to the St. Louis court of appeals, affirmed, and defendant has appealed to this court.

There is no question, it is not denied, that defendant shot and killed Mrs. Broemser under circumstances which constituted the homicide a murder of the first degree, unless defendant was insane to a degree which rendered him irresponsible for the act when committed.

That was the only defence relied upon, and two juries, under instructions on the subject of insanity, which have been repeatedly sanctioned by this court, have found against him on that issue, and we are relieved of the necessity of considering that question in any of its aspects, since there was abundant evidence to warrant the finding of the jury.

The most difficult question in the case, and one which has been most carefully considered, is that which arises on the order appointing Judge Burckhartt to preside on the trial of the cause. By the act establishing the "St. Louis criminal court," found in the appendix to volume 2 of the Revised Statutes of 1879, on an application for a change of venue from that court, on account of any legal objection to the judge of that court, it was provided by section 16 that the cause should not be sent to a different county for trial, but should be transferred to the circuit court.

By section 19 application for changes of venue from the St. Louis criminal court for any of the causes provided by law was required to be made to a judge of the St. Louis circuit court, who should hear evidence and determine the existence or non-existence of the fact stated in the petition, and, if found true, state the same in writing, and issue his warrant to the judge and clerk of the criminal court, commanding them to transfer the cause to the St. Louis circuit court, and, by section 16, upon transcript of the record of such cause being filed in the office of the clerk of the court to which the same shall have been transferred, such court shall be possessed of full jurisdiction of the cause, and proceed to hear and determine the same.

By an act of the general assembly, approved March 26, 1881, entitled,
769 "An act in relation to criminal procedure in the city of St. Louis, and to repeal sections 18 and 19 of chapter 2 of the appendix of the Revised Statutes of Missouri concerning the 'criminal court,'" it was provided in section one that changes of venue should be allowed from that court for any cause for which a change of venue may be allowed from other courts in this State exercising criminal jurisdiction, but no special judge should be elected or selected from the members of the bar to sit on the trial of the cause on account of the incompetency of the judge of said court; but that in such case the judge might, by order of court, set the cause down for trial,

and notify and request any judge of any circuit or criminal court in this State to try it. By section 2 the 18th and 19th sections of the act establishing the St. Louis criminal court were repealed. The third and last section provides when the act shall take effect.

By the 53d section of article 4, of the constitution of 1875, the general assembly is prohibited from passing any local or special law "regulating the practice or jurisdiction or changing the rules of evidence in any judicial proceeding," &c., &c. In ex parte Allen, 67 Mo., 533, it was held that "an act making provision for supplying the place of criminal judge, in the event of his sickness, absence, or inability to hold court," was one "regulating the criminal practice and procedure in courts of record." The act of 1881 is a special law, applicable to the St. Louis criminal court only, and, therefore, in conflict with the constitution; section 54, of the fourth article of the constitution, providing in what manner local legislation may be obtained, has no application, because section 53 is an absolute prohibition of local or special legislation on the subjects therein specified. But it may be contended that, although the first section is unconstitutional, the repealing section may stand, because the constitution authorizes the general assembly to pass laws repealing special or local acts.

There are but three sections to the act in question, the first providing for what cause, and in what manner, changes of venue may be granted; the second repealing sections 18 and 19 of the act establishing the criminal court, and the third providing when the act should take effect. The first section substitutes a different mode of procedure, on application for change of venue, from that provided in the sections of the criminal court act repealed, and the other sections have no other purpose but to give effect and operation to that section. As a general proposition, it may be conceded that, although one or more provisions of an act of the legislature be in conflict with the constitution, it does not necessarily follow that other provisions of the same act are also unconstitutional. (Cooley's Constitutional Limitations, 177, 178.)

"If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other. But if it purports to accomplish a single object only, and some of its provisions are void, the whole must fail unless sufficient remains to effect the object without the aid of the invalid portion." (Ib.) But we shall not prolong the discussion on that subject, inasmuch as we hold that the appointment of Judge Burckhartt was proper without regard to the act of 1881; sections 1877 to 1881, inclusive, of the Revised Statutes of 1879 and section 1999 settle the question. By the first of said sections it is provided that "when any indictment or criminal prosecution shall be pending in any circuit or criminal court the judge shall be deemed incompetent to hear and try said cause in either of the following cases." It proceeds to enumerate these cases, and they include that of the prejudice of the judge.

Section 1878 provides for the election of a special judge on an application for a change of venue on the ground that the judge is incompetent for any cause specified in the preceding section. Section 1880 provides that the judge may order an election of a special judge without an application for a change of venue when it shall be within his knowledge that any of the enumerated causes exist which disqualify him to sit in the case.

Section 1881 provides that if the case in which the judge is incompetent to sit for any of the causes named in section 1877 be a felony, and no suitable person to try the case will serve when elected, or if, in the opinion of the judge, no competent or suitable person can or will be elected as such special judge, he need not order an election, but may request the judge of some other circuit to try the cause. By section 1999 the provisions of the criminal code applicable to the circuit court and the judges thereof shall also be applicable to any other court of record exercising criminal jurisdiction, and the judges thereof in all cases where no other or different provision is made by law for the government and control of such court.

Sections 1877, 1878 were substantially embodied in the act approved May 19, 1877, and the first clause of section 1880 is the same as section 3 of the act of 1879, and by section 4 of that act all acts and parts of acts inconsistent with its provisions were repealed. It follows that so much of section 18 of the act establishing the criminal court of St. Louis as required applications for changes of venue from that court, on the ground of the incompetency of the judge of that court, to be made to the circuit court of St. Louis and section 16 of said act are repealed, because totally repugnant to the sections of the criminal code above recited. To give those sections full force in their application to all courts having criminal jurisdiction would be impossible, if the application for a change of venue on the ground of incompetency of the judge had to be made to the judge of the circuit court. The jurisdiction of the St. Louis circuit court, under said section 19, supra, is limited and special. It is to hear the application, and if the facts are found, as alleged, to issue his warrant to the clerk and judge of the criminal court, commanding them to transfer said cause to the St. Louis circuit court, and, when such transfer is made, gives the circuit court full jurisdiction of the cause, to hear and determine it. The judge of the circuit court of St.
770 Louis is not authorized, by any act, to order an election, or appoint a judge, on such applications. He can only refuse the application or order the cause transferred and try it. We also think that by the phraseology of section 1878 the application is to be made "to the judge of the court in which the cause is pending." Whenever the application is made for a change of venue for any causes enumerated in section 1877 "it shall be lawful for the judge to hear such application." What judge? Evidently the judge of the court in which it is pending. That is so of all applications for changes of venue from the circuit courts of the State, and from all courts where there is not a special provision to the contrary.

Section 1999 continues the jurisdiction of the circuit court on applications for change of venue made on account of the prejudice of the inhabitants, because, while it provides that the provisions of the criminal code, applicable to the circuit court, &c., shall be applicable to any other courts of record exercising criminal jurisdiction, it excepts those cases in which other or different provision is made by law for the government and control of such courts or judges. No such exception occurs in the other sections of the general statutes, prescribing the manner of obtaining a change of venue, on the ground of the incapacity of the judge, and it strengthens the view here taken that sections 1856, 1857, 1858, 1859 of the general law providing for changes of venue in criminal causes on the ground of prejudice of the inhabitants, by their terms are applicable only to the circuit courts. They do not therefore apply to the criminal court of St.

Louis, but leave the law in relation to changes of venue from that court on the ground of the prejudice of the inhabitants, as found in section 19 of the act establishing the criminal court.

We therefore conclude that the appointment of Judge Burckhartt was made in strict conformity with law, and that defendant's applications for a change of venue, on the ground of the prejudice of the inhabitants of St. Louis, were properly refused because made to the judge of the criminal court and not to the judge of the circuit court of the city of St. Louis. It is contended by appellant's counsel that the indictment should have been quashed, because found by a grand jury for the body of the county of St. Louis prior to the separation of the county and city by the scheme and charter. The homicide was committed in the city, and the point they make is, that one cannot be tried on an indictment not found by a grand jury of the jurisdiction in which the offence was committed. In other words, that the separation by the scheme and charter virtually quashed the indictment found before the separation, and made it necessary that defendant be reindicted by a grand jury of the city of St. Louis. If the offence had been committed within what are now the limits of the county of St. Louis, it would probably have been defendant's right to be tried in the county, but we are not prepared to assent to this proposition of his counsel. If it be correct, then all persons indicted for crimes, to the prosecution of which there is, by law, a limitation as to time, would have been entitled to their discharge, if the time had elapsed when the separation occurred. They could not be tried on the old indictment because not found by a grand jury of the proper jurisdiction, and to a new indictment they could have pleaded the statute of limitation. However, this question was by the court of appeals satisfactorily disposed of in its opinion delivered herein.

The refusal of defendant's application for a continuance, made to Judge Burckhartt, is next to be considered.

It was based upon the absence of three witnesses, William Goebel, J. K. Knowles, and A. Sochugens, and the affidavit, after stating what they would respectively testify to, which, it may be conceded, was material evidence, alleges, in relation to Goebel, that he was in attendance upon the court at the December term, 1880; that he then resided on Third, between Elm and Spruce streets, in St. Louis; that on the 6th day o. May, 1881, defendant's attorneys had a subpœna issued for him and placed in the hands of the sheriff of said city, with witness' address upon the back of the subpœna, and that they also gave the sheriff directions as to where they believed he then resided, and where he had been seen a few days before; that the subpœna was returned "not found;" that, although efforts had been made within two days before filing of said affidavit to find him, the attorneys had failed. They are informed, and now believe, that he has lately removed to the southern portion of the city, and since the call of the case, on May 10, 1881, they have been unable to ascertain his location. This affidavit was filed May 11, 1881. When the subpœna was returned does not appear; if on the 6th of May, as we infer, because the affidavit must be taken most strongly against him, then no effort was made until the 9th of May, although the case was set for hearing on the 10th, to learn where the witness resided. It is nowhere stated what efforts were made

to ascertain where he was. It does not appear that they made inquiry where he formerly resided, and not an act of diligence is disclosed except the procuring of a subpœna and placing it in the hands of the officer, and this not until the 6th of May, the case being set for trial on the 10th. This cause had been pending nearly seven years, and during all that time the accused had counsel who, in other respects, have exhibited commendable zeal in his behalf, and it is singular that with respect to a witness as important as they deemed Goebel, no greater diligence to procure his testimony was used.

With respect to Knowles, the affidavit alleges that before the first trial of this cause he left the United States and went to England, where he remained until the fall of 1880, when he returned to the State of Illinois, locating near Alton. That he was in attendance at the December term, 1880, when the cause was continued; that as soon as defendant was informed that the act of 1881 had been passed—and this act was approved March 26, 1881—he began his efforts to procure the attendance of said Knowles, and then learned for the first time that he had removed
771 from Illinois, and within the last few days first learned that his present residence is Elkhorn, Indiana. The affidavit nowhere shows that any effort whatever was made to ascertain his whereabouts after the defendant learned that he had left Alton. No inquiries at Alton, by correspondence or otherwise, to ascertain where he had gone. An affidavit for a continuance must state the facts which show diligence; not merely that diligence was used.

With respect to Sochugen, the affidavit alleges that he resides at No. 1911 Lynn street, St. Louis, and that a subpœna was issued for him and placed in the hands of the sheriff on the 6th day of May, 1881, with his address on the back of the subpœna, and that the sheriff's return was that he was not found; that defendant is informed that he is temporarily absent from St. Louis. When this information was received, whether before or after the subpœna was issued, does not appear. How long that absence would continue is not stated. From the evidence in the record it appears that this witness spent his time between Chicago and St. Louis; that he was frequently absent from St. Louis, and yet no effort was made to serve him with a subpœna until the 6th of May, four days before that on which the case was set for trial, and none whatever to take his deposition. It also appears from this record that William Goebel, one of the three persons on account of whose absence the continuance was asked, was actually present and testified in the cause. We are satisfied from all the foregoing facts that the application for a continuance was made for delay merely, when the record discloses the fact that the affidavit in many of its material allegations is absolutely false, as appears here from the testimony of Gobel, compared with that which the affidavit stated he would testify to, we are inclined to sustain the trial court in its refusal to grant the continuance. The granting of continuances is somewhat in the discretion of that court and we will not interfere, unless that discretion has been manifestly abused. Nor did the court err in the matter of defendant's pleas. He had asked leave of the court to withdraw his plea of guilty and to enter a plea of not guilty, which was refused, and thereupon he appealed and obtained a reversal of the judgment on that ground alone. When the cause was again called he insisted upon the agreement made with the circuit

attorney that on the plea he should be sentenced to ten years imprisonment in the penitentiary, and for no longer term. It was an attempt to force the court to permit the accused to dictate the punishment he should receive. If the court should sentence him for ten years, he would let his plea stand; if for a longer period, he would again appeal and have the judgment reversed on the same ground as before. He would not stand absolutely by his plea, but only conditionally. It was trifling with the court. He was repeatedly asked whether he would withdraw that plea, or stand upon it, and as often refused to withdraw it, and insisted upon his agreement with the circuit attorney. The court had sustained his motion for leave to withdraw that plea, and enter one of not guilty, and therein obeyed the mandate of this court, and the defendant's duty was, either to withdraw the plea, and plead not guilty, or stand unconditionally upon his plea of guilty. In refusing to do either, he virtually stood mute, and the action of the court in setting aside the plea of guilty, and ordering the clerk to enter a plea of not guilty for him was proper.

There is nothing in the point, that after an accepted plea of guilty of murder of the second degree the defendant could not be put upon trial for murder of the first degree. We shall, on that proposition, accept what was said by the court of appeals in its opinion in this cause.

Nor do we perceive any error in the selection of the jury. The defendant's counsel were permitted to examine them as to the very matters which they allege the court refused them permission to inquire into.

It is assigned as error that on the trial of the cause the State was permitted to prove that defendant had, prior to the homicide in question, committed the crime of forgery in the State of Illinois. The State introduced one Webber as a witness, and on his cross-examination by defendant's counsel this fact was first disclosed in answer to direct questions propounded to him, and they cannot complain that the State was afterwards permitted to examine a witness in relation to what was so testified to by Webber on cross-examination. No other facts, in relation to that crime, were proved by the State than those already brought out on the cross-examination of Webber. Nor do we think that it was error to permit witnesses Beck and Smith to testify to statements of the accused, after the homicide, that he was sane when it was committed. It was admissible for what it was worth, and its value was to be determined by the jury.

It is alleged that the court erred in permitting the witness Webber, for the State, to testify to statements made by the deceased in relation to certain injuries to her mouth and teeth, as dying declarations. Whether admissible as such or not we will not stop to inquire. They related to the assault and killing, which are only formally denied, but really admitted, and were wholly immaterial on any other issue in the case.

As to the testimony of Dr. Schluentzhaur, his deposition was read for the defence, but it was afterwards discovered that it was mutilated and the court withdrew it from the jury. The witness resided in the State of Illinois, but was sent for by the accused, and the court stated that when he appeared he might be introduced to testify out of time. When he arrived the State was offering evidence, and the circuit attorney objected to his introduction at that time, and by agreement a deposition of the witness read at a former trial was read as his testimony. We do not find in the record that the defence afterwards offered to introduce this witness,

but if they had, the reading of the deposition, under the agreement, precluded the defendant from introducing him as a witness afterwards.

772 We have noticed all the alleged errors relied upon by the prisoner's counsel, and are of the opinion that no error was committed by the learned judge who presided at the trial with such marked ability and impartiality which would warrant a reversal of the judgment. Without any provocation he called Mrs. Broemser out of her dwelling-house and deliberately killed her by shooting her with a pistol. There have been two trials of his case in the criminal court, each of which resulted in his conviction. Two judgments of the criminal court against him have been reversed by this court. Two juries have found against him on his plea of insanity, and declared by their verdicts that he was guilty of deliberate murder, and as no error occurred on the last trial of his cause the judgment is affirmed, and the sheriff of the city of St. Louis is hereby ordered to execute upon the defendant the sentence of the criminal court of the city of St. Louis, on the 24th day of February, 1882, the time fixed for the execution of that sentence by that court having passed, and the clerk of the St. Louis criminal court will issue a warrant of execution accordingly. All concur.

JOHN W. HENRY.

On the back of said opinion appear the following endorsements:

The State of Mo., resp., vs. Charles F. Kring, app. Opinion of the court. Henry. Filed Jan'y 30, '82. Henry W. Ewing, cl'k. By W. K. Bradbury, D. C.

And afterwards, to wit, on the 13th day of February, 1882, there was filed in the above-entitled cause an appeal bond, which is in the words and figures as follows, to wit:

773 Know all men by these presents that we, Charles F. Kring, as principle, and Frederick H. Kring, as sureties, are held and firmly bound unto The State of Missouri in the full and just sum of one thousand dollars, to be paid to the said State of Missouri or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this day of February, in the year of our Lord one thousand eight hundred and eighty-two.

Whereas lately, at the October term, 1881, of the supreme court of the State of Missouri, in a suit depending in said court between the State of Missouri, plaintiff, and Charles F. Kring, defendant, judgment was rendered against the said defendant, and affirming the judgment of the St. Louis criminal court, in which the defendant was convicted of murder in the first degree, and the said Charles F. Kring, defendant, having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiff, The State of Missouri, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October next:

774 Now the condition of the above obligation is such that if the said defendant, Charles F. Kring, shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make good

his plea, then the above obligation to be void; else, to remain in full force and virtue.

F. H. KRING. [SEAL.]

Sealed and delivered in presence of—

Approved by—

SAM. F. MILLER.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

Frederick H. Kring, obligor in the within bond, being duly sworn, on his oath deposes and says that he is worth, over and above all his debts and liabilities, the sum of fifteen thousand dollars, and that he owns real estate to the amount of six thousand dollars subject to execution within the State of Missouri.

FREDERICK H. KRING.

Subscribed and sworn to by said Frederick H. Kring, the above-named affiant, this 7th day of February, A. D. 1882, before me, at office in the city of St. Louis.

A. P. SELBY,
Comm'r U. S. Cir. Court, E. Dist. Mo.

775 On the back of said bond appear the following indorsements, to wit:

No. . United States circuit court, eastern district of Missouri State vs. Kring. Bond. $. Filed 13th day of Feb'y, 1882. Henry W. Ewing, clerk.

STATE OF MISSOURI, *ss:*

I, Henry W. Ewing, clerk of the supreme court of the State of Missouri, certify that the above and foregoing is a full, true, and complete transcript of the record and proceedings had in the above entitled cause as fully as the same remain of record and on file in my office.

In testimony whereof I hereto set my hand and affix the seal of said court, at office in the city of Jefferson, this 28th of September, 1882.

[SEAL.] HENRY W. EWING, *Clk,*
By E. B. EWING, *D. C.*

(Indorsement on cover:) No. 1041. Charles F. Kring, plaintiff in error, vs. The State of Missouri. Missouri sup. court. Filed 11th October, 1882.

OFFICE SUPREME COURT U. S.
FILED
MAR 2 1883
JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the U. S.

OCTOBER TERM, 1882.

CHARLES F KRING,
Plaintiff in Error,

vs.

STATE OF MISSOURI,
Defendant in Error.

No. 1041.

JEFF. CHANDLER,
Of Counsel for Plaintiff in Error.

IN THE

Supreme Court of the U. S.

OCTOBER TERM, 1862.

CHARLES P. KENNO,
Plaintiff in Error,

vs. [041.

STATE OF MISSOURI,
Defendant in Error.

JEFF. CHANDLER,
Of Counsel for Plaintiff in Error.

IN THE

Supreme Court of the U. S.

OCTOBER TERM, 1882.

CHARLES F. KRING,
Plaintiff in Error,

vs. No. 1041.

STATE OF MISSOURI,
Defendant in Error.

The error assigned and relied upon to reverse the judgment of the Supreme Court of Missouri in this case is, that said Supreme Court of Missouri erred in giving to section 23 of article 2 of the Constitution of Missouri effect as a rule of liability in this case, which is: "That no person shall be compelled to testify against himself in a criminal cause, nor shall any person, after being once acquitted by a jury, be again for the same offence put in jeopardy of life or liberty; but if the jury to which the question of his guilt or innocence is submitted fail to render a verdict, the Court before which the trial is had may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the next term of Court, or if the state of business will permit, at the same term; and if judgment be arrested after a verdict of guilty on a defective indictment, or if judgment on a verdict of guilty be reversed for error in law, nothing herein con-

tained shall prevent a new trial of the prisoner on a proper indictment, or according to correct principles of law."

That as to this case, said provision is *ex post facto* and void.

2. That said Court erred in not holding that provision of the law of Missouri which forbids a change of venue from the Criminal Court of the city of St. Louis void, and in violation of the fourteenth amendment of the Constitution of the United States, inasmuch as said law denied to plaintiff in error the equal protection of the law.

An *ex post facto* law literally is a law passed after and concerning the fact, or thing done, or action committed. The meaning of the prohibition against *ex post facto* laws is that the legislatures of the several States shall not pass laws after a fact done by a subject or citizen which shall have relation to such fact, and shall punish him for having done it.

Calder v. Bull, 3 Dallas, 390.

A law which makes an act, innocent when done, a crime, or which aggravates a crime, or makes it greater than it was when committed, or alters the rules of evidence and receives less or different testimony than the

An *ex post facto* law is one which, in its operation, makes that criminal, or penal, which was not so at the time when the action was performed, or which increases the punishment, or which, in relation to the offense, or its consequences, alters the situation of the party to his disadvantage.

U. S. v. Hall, Wash. Circ. Ct. Rep. 2. 366.

definition is consulted, it determines the character of a law complained of as *ex post facto*. So varied may be the unfavorable effects of retrospective laws upon persons charged with crime, that to determine whether a given law is *ex post facto* or not, the Court must rely upon principle rather than upon a definition.

Judge Chase, after approaching as near a definition of an *ex post facto* law as he considered practicable, in commenting upon the unrighteous acts of the British Parliament which moved the framers of our government to set up this restraint, says, " at other times they inflicted punishment where the party was not by law liable to any punishment," which of course means liable under laws existing at the time the act was done, and further, he says the prohibition against *ex post facto* laws " is an additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts having a retrospective operation. "

Chancellor Kent, speaking of the prohibition against such laws, says " it extends to laws passed after the act and affecting a person by way of punishment for that act either in his person *or estate*."

1 Kent's Com. 409.

If a law produce the effect of an *ex post facto* law it is condemned as *ex post facto*.

Cummins v. Missouri, 4 Wal. 326.

It is submitted that " the very essence of a new law is a rule for *future cases* " as is declared by Kent, Judge in case of Dash v. Von Kleech, 7 Johnson, 477.

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Ib. 390–1.

It is submitted that a retrospective law which changes the rule of liability or the remedy existing at the time the act complained of by the State was done, to the disadvantage of the person charged with the crime, is *ex post facto*.

There can be no unyielding definition of *ex post facto laws* made with such mechanical exactness that, when that

definition is consulted, it determines the character of a law complained of as *ex post facto*. So varied may be the unfavorable effects of retrospective laws upon persons charged with crime, that to determine whether a given law is *ex post facto* or not, the Court must rely upon principle rather than upon a definition.

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For "the ideas of right and remedy are inseparable, want of right and want of remedy are the same thing."

Edwards v. Kearzey, 96 U. S. 600.

"I think (says Sharkey, Chief Justice, in Davis v. Minor, 1 Howard, Miss. 183) the effect or operation, and the remedy, may clothe a party with a defence, or a right to set up a resistance which cannot be taken from him without his consent. If a party be deprived of his remedy, in what does his right consist? Whatever the rule may be in morals, in a purely legal point of view, I think, it is dificult to imagine the existence of a right without some adequate remedy. It is a maxim that there is no right without a corresponding remedy; by which I understand that they are dependent terms; that one cannot exist without the other; that the idea of a right is predicated on, and necessarily carries with it, as essential to its existence, the means also of enforcing it; and the moment the remedy is destroyed, the right must go with it * * * If it be true that the remedy is a constituent part of a right, and that they cannot exist separately, must it not follow that whatever destroys the one, must destroy the other?" * * * * * "After suit instituted, and before trial, a law was passed authorizing the sheriff to set up such recaption as a good defence; and it was decided to be inapplicable on the ground that it would be giving to the Statute a retrospective operation. Suppose the case had been reversed, and the Statute instead of giving the sheriff the defence, had taken it away from him after suit and defense pleaded, but before trial; it seems to me that for the reasons given by Chief-Justice Kent, the Court would have sustained his defense as being good at the time of the act for which a recovery was sought,

and that it could not be taken from him without some act on his part, because at the time it was a good defense."

In Calder v. Bull, 3 Dall. 386, Judge Chase says, "every law that takes away or impairs rights vested agreeably to existing laws, is retrospective, and is generally unjust, and may be oppressive; and it is a good general rule that a law should have no retrospect."

In the case of Osborne v. Huger, 1 Bay. 179, it is equally inadmissible to consider the act as declaring how the former Statutes were to be construed as to cases already existing. If this interpretation was to be considered as giving the former acts a new meaning, it then becomes a *new rule*, and is to have the same effect as any other newly created Statute."

A simple right to defeat suits *ex contractu* or *ex delicto* cannot be taken away by the repeal or modification of a law.

Moore v. State, 2 Criminal Law Magazines, 378–9, New Jersey Ct. of Errors and Appeals, March, 1881.

The same Court, speaking of the provisions of the Constitution of the United, States, limiting and moderating the power of the government in criminal proceedings against the citizen say, "certainly, no such guards are thrown by the organic law around the rights of property as those with which it protects life and liberty against the State? And if it can be gathered from that instrument that the legislature cannot take away from the citizen a title or a defence for property which he has acquired under the law, *a fortiori* must it be thence deduced that such a power may not be wielded against life or liberty."

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It is respectfully submitted that the following propositions are established by the adjudications.

1. That a new law is a rule for future cases.

That a law should have no retrospect.

That it is inadmissible to change the construction of former laws as to cases already existing.

A liability, or a right making its appearance under the law, is measured by the perils or loss in the one case, and the benefits and gains in the other, which the then existing remedy may bring as a legal consequence of such liability or right. There can be no such thing as an inanimate or non-enforceable legal liability or right. A legal liability can only be felt by the perils, disabilities and losses which flow from the liability through the remedy. If either perils, disabilities or losses, are increased by a law passed after the act out of which the liability springs has hapened, then the liability, which has no independent existence without the remedy is enlarged to the extent of such increase.

If a statute or Constitutional provision which limits the perils or jeopardy of punishment to one trial for an alleged offence be so changed after the alleged criminal act has been done as to permit two or more trials of a defendant for that act, in the event of an acquittal on the first trial, then the costs, terrors, and jeopardy of the subsequent trials are additional to what could have befallen the defendant had said change not been made. If, under a law permitting a defendant to be tried but once for an alleged offence, he be acquitted, the offence is, by operation of law, extinguished. To increase the number of trials for an act after the act has been done is equivalent in hardship at least to increasing by law the criminal character of the act itself. Under the Constitution of Missouri, as it existed when the act charged against the plaintiff in error was committed, he could

not have been put in jeopardy of conviction for murder in the first degree but once. That jeopardy he has encountered and escaped from, but in the mean time a new Constitution has been adopted, and he is now prostrated by a blow from that. That one should not be twice put in jeopardy of life is a deep and humane principle of justice, and though the State may betray that principle, it cannot do so by an *ex post facto* law.

The argument of the State of Missouri, through its Attorney-General, that the Supreme Court of Missouri could change its construction of the Constitution so as to create a new rule for the government of a case after it has come into and passed through the lower courts, is answered, as we think, by the brief submitted on the motion to dismiss this case for want of jurisdiction, which is filed as a part of this brief. But, in addition to that argument, it may also be suggested that in enacting the new Constitution, the State of Missouri, assembled in convention, in effect recognized and affirmed the construction so long theretofore placed on the old Constitution by the courts, said convention being convened to revise the old Constitution, went to work upon it as construed by the Supreme Court of the State, and by express terms changed it in the particulars herein considered. In so doing, the State, in its highest capacity, by the strongest implication, adopted the construction of the courts, and thereafter, if not before, the State courts were powerless to withdraw that construction.

United States v. Freeman, 3 How., 565.

It is difficult to see why the Supreme Court of the State of Missouri deems it to the interest of that State to possess the power to so modify or change the mode of procedure in this particular case after the act done as

to bring new and additional perils to the party charged. Such a power can bring no honor to the State, but rather derangement and confusion. It is essential to the security of the subject that laws shall operate in the future, and not upon the past. In the very Constitution whose provisions the Supreme Court of the State resort to, to uphold the conviction in this case, it is provided, section 15, Article 2: "That no *ex post facto* law, nor law impairing the obligation of contracts, or *retrospective in its* operation * * * can be passed by the General Assembly."

The same provision against retrospective laws was in the Constitution of Missouri in force when the act with which plaintiff in error is charged was done, and was expressed as follows: "That no *ex post facto* law nor law impairing the obligation of contracts, or retrospective in its operation, can be passed." Section 23, Article 1, of the Constitution of Missouri, adopted July 4, 1865.

So that, at the time the alleged crime charged against plaintiff was committed, the plaintiff had the right, under the State laws, to stand unaffected by laws retrospective in their operation. While there is no provision in the Constitution of the United States prohibiting a State in terms from passing a law "retrospective in its operation," yet, if a State have such a provision in its own Constitution, and a right or benefits spring up in said State under such law, can said State invade such right or benefit by a law passed after the right or benefit became established, without violating the spirit, if not the letter, of the *ex post facto* provision of the Federal Constitution? Such a State stands in no position, at any rate before this Court, to insist upon a technical construction in its favor of the *ex post facto* prohibition. Is it not a fair argument to

say that Missouri was not as free to change even the mode of criminal procedure in her courts to the disadvantage of a person charged with crime under her laws as she would have been had her Constitution not prohibited laws retrospective in their operation? Having sheltered her citizens from all effects of retrospective laws, either as to liability or mode of procedure in all cases criminal and civil, is not the right of her citizens to stand free of such laws more clearly and sharply defined than the right of a citizen of another State where no such prohibition prevailed? Is it not the right of the citizen, which the laws of a State creates by its own laws after all, which the Federal Constitution forbids the State to take away by *ex post facto* laws?

It is suggested in the brief of the Attorney-General of Missouri that though, by operation of the Constitution of Missouri, plaintiff was acquitted of murder in the first degree, had he not made a motion to withdraw his plea of guilty to murder in the second degree, which had been accepted by the State, yet he by so doing waived his right to thus stand acquitted. The proposition, then, is this: That one tried for murder and acquitted may agree with the prosecuting attorney to be tried again for the same offence, and the Court having criminal jurisdiction will enforce the contract, though the Constitution of the State forbids the second trial. This proposition cannot be sound—jurisdiction cannot be given by consent. The doctrine of waiver, however far it may have been carried in other States, in the administration of the criminal law in the State of Missouri, a defendant cannot waive his Constitutional rights, especially as to jurisdiction.

State v. Mansfield, 41 Mo.

But the question of waiver is not before this Court. It is not a Federal question. The Supreme Court of Missouri treated the plea of guilty of murder in the second degree in this case precisely as a verdict of guilty of that degree. After getting rid of that plea, by reversing the judgment founded upon it, the Court passed from that point to the status of the case as it was after that plea was got out of the way, and a new one of not guilty entered. Then the question could the defendant be tried for murder in the first degree came up, and the Supreme Court of Missouri held that he could, because of the change in the rule as it existed at the time of the homicide to the rule of the new Constitution. So that the case turned in the Supreme Court of Missouri on the effect of the new rule. What was said about the plea and the manner of getting it out of the record, so that the case might proceed anew on a plea of not guilty, related to a question of practice merely. But after that plea had became displaced by the legal effect of the reversal by the Supreme Court of the judgment rendered on that plea, or by its withdrawal by the defendant, directed so to do by the Court in consequence of such reversal, and a new plea of not guilty entered in its place; then the question properly came up: What could plaintiff, under the new plea, be tried for? And the Court held that inasmuch as the rule of the old Constitution was changed by the new, he could be tried for murder in the first degree. This ruling and decision present sharply the question discussed above.

The decision of the Supreme Court on the *ex post facto* point is as follows:

"There is nothing in the point that after an accepted plea of guilty of murder of the second degree, the defendant could not be put upon trial for murder of the

first degree. We shall, on that proposition, accept what was said by the Court of Appeals in the opinion in this case, which is as follows: 'Formerly it was held in Missouri (State v. Ross, 39 Mo. 32) that when a conviction is had of murder in the second degree on an indictment charging murder in the first degree, if this be set aside the defendant cannot again be tried for murder in the first degree.' A change introduced by section 23 of article 2 of the Constitution of 1875 has abrogated this rule. On the oral argument something was said by counsel for the defendant to the effect that under the old rule defendant could not be put on his trial for murder in the first degree, and that he could not be affected by the change of the Constitutional provision, the crime having been committed whilst the old Constitution was in force. There is however, nothing in this; this change is a change not in crimes, but in criminal procedure, and such changes are not *ex post facto*."

II.

The second question in this case is, can the State of Missouri in criminal causes, provide by law for a change of venue in cases of prejudice against a defendant, of the judge or people in all the counties of the State but one and deny the right to a change for such reasons, in that one without denying to the persons within that county the equal protection of the laws.

The only decision of this Court upon the subject here presented was rendered in the case of Missouri v. Lewis, 101 U. S. 22.

In that case plaintiff in error was disbarred by the Circuit Court of the City of St. Louis for misconduct, as an attorney. The law permitted him to appeal to the St. Louis Court of Appeals, which he did, but did not allow a further appeal to the Supreme Court of the State, which had appellate jurisdiction of similar controversies, outside of St. Louis and two or three adjacent counties.

Not being permitted to go to the Supreme Court of the State with his appeal, as he could have done had he resided elsewhere in the State, outside of the said counties above mentioned, the plaintiff in error in that case claimed that he was thereby denied the equal protection of the laws. This Court decided against him. In so doing the Court used language broad enough to appear to decide the question here raised adversely to the plaintiff in error in this case, upon this point. It is respectfully submitted however, that this case of Missouri v. Lewis, involved a question easily distinguishable from the one here presented, and what was said by the Court reaching beyond the determination of the question raised in that cause ought not to preclude the consideration of the point presented in this case. In the case of Missouri v. Lewis, the plaintiff in error had had one appeal. In other parts of the State only one appeal in like controversies was allowed, and this Court could not judicially determine which of the two Appellate Courts of Missouri was the highest exponent of justice in the particular matter brought before the Court in that case. The State of Missouri by its laws had furnished no standard by which to measure the equality or inequality of said Appellate Courts; so far as the record of that case showed anything, it disclosed two Courts of equal dignity, exercising similar jurisdiction in different parts of the same State, the relative ability of which, the laws of Missouri did not, and this Court could not determine.

In this case, however, the inequality complained of appears upon the face of the law itself. The law here involved is treating of the subject of a fair and impartial trial of a citizen charged with a high crime. The Constitution of Missouri declares that the accused in

criminal prosecutions shall have a public trial by an *impartial* jury of the county. (Section 22, article 2, Constitution of Missouri.)

The State of Missouri, by its law-making power, declares that when prejudice of the people or Court exists against a defendant to a certain degree, that a fair trial is thereby imperilled, and that a defendant is permitted to withdraw himself from that peril in all parts of the State except the city of St. Louis. If that peril in the city of St. Louis is sufficiently strong to hold the balance of power against him, his life is lost under circumstances where it would not be in other parts of the State. It be said that the right to a change of venue in a criminal case is a statutory right, and need not be given by the State at all. That is true, but having given it, thereby acknowledging the necessity for it, can the people of a particular county be deprived of it, and still be equal in safety from such prejudice with the people in all other parts of the State? In all counties of the State but one, the people are sheltered from the danger which comes from prejudice and partiality in the administration of the law; in that one county they are exposed to that danger, and are yet said to be equal in safety before the law.

In the case of Missouri v. Lewis, it is intimated that notwithstanding the fourteenth amendment, a State may chop up its jurisdiction into as many grades and systems of liability for crime and of criminal procedures as it thinks best. This proposition is most respectfully denied. All citizens owe to the Government equal allegiance and equal support; upon this equality of duty to the Government rests its right to impose equal burdens and responsibilities upon its citizens. (Munn v. Ill., 94 U. S. 124.) It is in this principle of equality

before the law and the lack of power of the majority to destroy it that the minority finds safety. It is said in the case of Missouri v. Lewis, page 32, that "it is not impossible that a distinct territorial establishment and jurisdiction might be intended as, or might have the effect of a discrimination against a particular race or class, where such race or class should happen to be the principal occupants of the disfavored district. Should such a case arise, it will be time enough then to consider it. No such case is pretended to exist in the present instance." It is submitted that if the fourteenth amendment will not permit, as it is suspected that it will not, the creation by the State of disfavored districts in which discriminations against a particular race or class would be tolerated, by what authority can it be claimed that the same amendment permits the State to create disfavored districts in which discriminations against persons of the same race or class will be tolerated. Said amendment does not mention race or class. In law there is neither race nor class. If anything has been accomplished by the late clarifying experience through which the country has passed, it is that all legal distinctions between races and classes are abolished. If a majority of the people of St. Louis were colored, and the discrimination herein complained of operated as it now does, it would be nullified by the fourteenth amendment, not because it would thereby be any more or less a discrimination then than now, but because the complexion of a majority of the people of the disfavored district would be different from what it now is. Can it be said that the right of a community of white persons, not to be discriminated against by the lawmaking power of a State, is less sacred than the same right of a community of colored persons. By what principle of law does it come about that colored

people possess this superior liberty? By what process of reasoning are colored persons preserved from discriminating enactments of a State, while the poor whites are left to the torment of unequal legislation, all living under the same constitution and Government.

It is said in the Missouri-Lewis case that a State is free under the fourteenth amendment to establish two systems of judicature in different parts of its territory. Such right would not reach the case here. In the case of the two systems of judicature no test might be available to determine which of the two furnished the higher measure of protection to persons or property. In this case, however, nothing is left to uncertainty. The law here complained of *on its face denies ~~denies~~ the equal protection of the law* to the people of St. Louis. It creates a right to all the people dwelling outside of St. Louis, and in terms denies that right to people living in the city of St. Louis. The Court in this case need not resort to judicial weights and measures to see whether there is an inequality or not; for the statute here complained of in its provisions confers a right upon some and denies it to others by express language.

It is submitted that equality and uniformity of operation upon all alike is one of the first principles of law, and one of the highest guarantees of justice to the people of a given jurisdiction. It was to preserve this principle from violation by the States in their domestic jurisdiction that the fourteenth amendment was enacted, and it operates to that end without respect of race or classes

The suggestion that because different States, separated from each other only by an imaginary line, may have different grades of criminal liability, that therefore a State may depart from equality and uniformity in its

laws, it is respectfully submitted, ought not to be conclusively declared without further examination. The Fourteenth Amendment does not require harmony or equality between laws of different States. It does not restrain one State from differing with an adjoining State, but it does exact equal treatment by each State of its own people.

A law which punished murder in all the State but but one county with imprisoment for ten years, and in that one county with death, would be condemned on general principles and particularly by the Fourteenth Amendment. So a law which preserved the right of trial by jury in larceny cases in all parts of the State but one county, and in that one county denied in terms that right would be unconstitutional without respect of the complexion of the people thus denied the right. So too a law which on its face provides safety to all the inhabitants of a State, but those of one county, against a given danger, and denies in express terms, protection to the people of that one against that danger, is null and void so far as the denial is concerned.

Is there any great good to come to a State from the the power to make unequal laws? Is there any presumption in favor of such a power? Is not the power to discriminate of close kin to arbitrary power? Does not such a power bring danger to the minority? May it not be a source of infinite evils in times of derangement of the public mind? Is it not full of possibilites of disaster to the citizen and without value to the State?

JEFF. CHANDLER,
Of Counsel for Plaintiff in Error.

OFFICE SUPREME COURT U. S.
FILED
FEB 27 1883
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Supreme Court of the United States.

No. 1041

OCTOBER TERM, 1882.

CHARLES F. KRING,
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vs.
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Writ of Error to the Supreme Court of Missouri.

STATEMENT AND BRIEF FOR PLAINTIFF IN ERROR.

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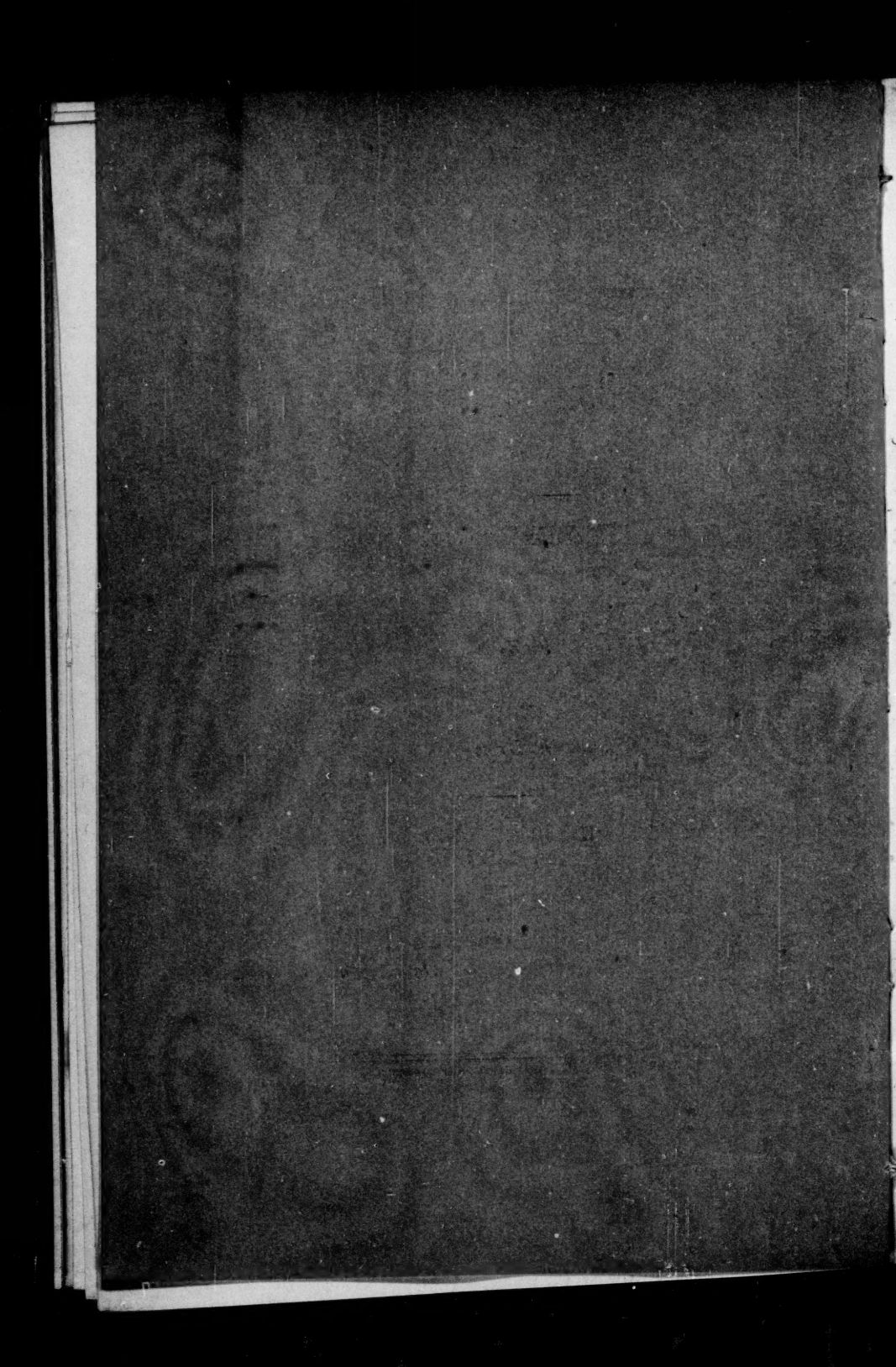

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STATEMENT AND BRIEF FOR PLAINTIFF IN ERROR.

The plaintiff was indicted by the Grand Jury of the County of St. Louis, State of Missouri, in the St. Louis Criminal Court, for murder in the first degree, in the month of March, 1875. He was tried and convicted as charged, in December, 1875; an appeal was taken to the Supreme Court of the State, and the case was reversed and remanded. In November, 1879, after several mistrials it was agreed between his counsel and the Circuit Attorney that if he would withdraw his plea of not guilty and enter a plea of guilty of murder in second degree he should be sentenced to the penitentiary for a period not to exceed ten years. He withdrew his plea of not guilty of murder in the first degree and entered a plea of guilty of murder in the second degree, by leave of the court, and with the consent of the Circuit Attorney, and the court ignored the agreement between his counsel and the Circuit Attorney, and sentenced

him to the penitentiary for the period of twenty-five years.
Rec., p. 23 The plaintiff moved the court to set aside the judgment and allow him to plead not guilty. An appeal was taken and the case was reversed and remanded by the Supreme Court,
Rec., p. 24 with no specific direction to the trial court.

Under the Constitution and laws of Missouri in force at the time the offense was alleged, in said indictment, to have been committed, the plaintiff could not be tried for murder in the first degree after he was convicted or pleaded guilty of murder in the second degree. But, under the Constitution of 1875, as construed by the Supreme Court, one indicted for murder in the first degree and convicted, or sentenced on a plea of guilty of murder in second degree can be again tried for murder in the first degree in case of an appeal and reversal.

Rec., p. 24 25 When the mandate of the Supreme Court was received the plaintiff was brought into court and asked if he desired to withdraw his plea of guilty and enter a plea of not guilty, and he stated to the court that he did not, and his counsel moved the court to sentence him, and the motion was overruled.

Rec., p. 27 He was brought into court at a subsequent time in the absence of his counsel, and again asked if he desired to withdraw his plea of guilty of murder of the second degree and enter a plea of guilty of murder of the first degree, and he
Rec., p. 27 again refused to do it. The court then, of its own motion, set aside the plea of guilty and ordered a plea of not guilty of murder in the first degree entered for him.

Rec., p. 33 The case was set for trial, and before the day of trial plaintiff moved the court for a change of venue on account of the prejudice of the inhabitants, and contended that if the special law prohibiting the change of venue from St. Louis county was constitutional when enacted, that it had been ab-

rogated and annulled by the new order of things, under the Constitution of 1875, and the scheme and charter separating the county and city of St. Louis, and that under the general laws of the State he was entitled to the change of venue.

The court overruled the motion not for want of evidence, but on account of the special law. The plaintiff then, under the special law which provided for summoning a jury consisting of persons who reside in the county of St. Louis outside of the city, on proper application, moved for a special venire, and the motion was overruled, but at a subsequent time the court, of its own motion, set aside the order overruling the motion and ordered a special venire from the county. Rec., p. 36.

On the day set for trial the plaintiff challenged the array and moved for a special judge. Without sustaining or overruling the motion the court discharged the jury and cited plaintiff's counsel to appear and show cause why they should not be disbarred, and stated that the case was in a "rut" and legislation would be necessary. The Supreme Court of the State granted a writ of prohibition restraining the St. Louis Criminal Court from striking the names of plaintiff's counsel from the rolls.

At the next session of the Legislature a law was passed under which a judge from the interior of the State came to try the cause. Among the motions filed was one for change of venue, on account of the prejudice of the inhabitants, which was overruled.

When tried, plaintiff was convicted as charged. An appeal was taken, and the judgment was affirmed by the St. Louis Court of Appeals, and from that court an appeal was taken to the Supreme Court of the State, and that court also affirmed the judgment. Rec., p. 69, 74; 77, 84.

Rec., p. 78 & 80 The Supreme Court held that the special law under which the judge who tried the case was appointed was unconstitutional, but it also held that the order was valid under the general law of the State in reference to special judges.

Rec., p. 71 & 72 & 82 & 83 It was contended in all the courts by plaintiff's counsel that the section of the Constitution of 1875, adopted subsequent to the time the offense is alleged to have been committed and subsequent to the finding of the indictment, could not be applied to the plaintiff's case; that it changed the punishment, and was *ex post facto* and repugnant to the Constitution of the United States.

Rec 78 & 79, 80 & 81 Plaintiff's counsel also contended in all the State courts that the special law prohibiting a change of venue, under which plaintiff's motion was denied (change of venue being allowable in all the counties of the State, except St. Louis, under the general law) was repugnant to the Fourteenth Amendment of the Constitution of the United States.

The Laws and Constitutional Provisions of the State of Missouri:

The consideration of which is involved herein are as follows: The Constitution of 1820 contains the following provision:

"Art. 1, § 18. That in all criminal prosecutions the accused has the right to be heard by himself, and his counsel to demand the nature and cause of the accusation; to have compulsory process for witnesses in his favor; to meet the witnesses face to face, and, in prosecutions on presentment or indictment to a speedy trial by an impartial jury of the vicinage; that the accused cannot be compelled to give evidence against himself, nor be deprived of life, liberty or property, but by the judgment of his peers or the law of the land.

"Sec. 19. That no person, after having been once acquitted by a jury can, for the same offense, be again put in jeopardy, of life, or liberty; but if in any criminal prosecution the jury be divided in opinion, the court before which the trial shall be had, may, in its discretion, discharge the jury and commit or bail the accused for trial at the next term of said court." These provisions are contained in the Constitution of 1865.

The above provisions of the Constitution were construed by the Supreme Court in the case of the State v. Ross, 29 Mo. 32, as follows: "Another question presented by the record is whether the appellant, after having been put upon his trial for murder in the second degree and a new trial granted, could have been legally tried again for the higher grade."

"For the appellant it is maintained that the legal effect of such verdict is a bar to any further prosecution for murder in the first degree, and that the reversal of the judgment upon that verdict in nowise impairs the validity of the acquittal of the higher offense. On the part of the State it is urged that the constitutional provision which exempts a party from being put twice in jeopardy is a personal right or privilege, and that it has no application in the case of an erroneous judgment, which the accused, at his own instance, caused to be set aside; that if the former verdict is still in force so far as it acquitted the appellant of murder in the first degree, still the verdict in this case being for a lower grade of offense, he is not injured and has no cause of complaint.

"In this case the verdict is for murder in the second degree, and it expressly finds not guilty of murder in the first degree. But without any such express findings this would have been the effect of the verdict.

State v. Bull, 28 Mo. 327.

"In that case it was held that a verdict of murder in the second degree by necessary implication, finds not guilty of the higher offense, and a conviction of murder in the second degree necessarily acquits of murder in the first degree. The only question, therefore, is whether the appellant, having obtained a new trial, the whole case should have been re-opened and a re-trial had upon the whole indictment. * * * * * The contention on this point is that the effect of the first verdict being an acquittal of the appellant of murder in the first degree he could not legally have been put upon his trial again on that charge upon the reversal of the judgment, and all the instructions given upon the hypothesis of murder in the first degree, of course, were improper."

And in the case of the State v. Smith, 53 Mo. 139.

"Smith was indicted in Boone Circuit Court for murder in the first degree. A trial was had, resulting in a verdict of murder in the second degree, and judgment accordingly; but on his motion for a new trial the verdict was set aside. At a subsequent term he filed his motion to dismiss the indictment, assigning as grounds:

"1st. That having been put on trial for murder, and the jury having found him guilty of that offense in the second degree, and the verdict having been, on motion of defendant, set aside and a new trial granted, he could not be put on trial for murder in the first degree.

"2d. That as defendant's defense was founded only on the insanity of defendant, if found guilty he could be convicted alone of murder in the first degree. This motion was sustained and the cause dismissed, and the State excepted, and after filing an unsuccessful motion to set aside the order of dismissal, again excepted and brings the case here by appeal.

"Treating the action of the court as tantamount to a discharge of the accused, which it will be presumed, in the absence of anything in the record to the contrary, immediately followed, we will examine into the correctness of the action.

"And the law in thisState is so well settled that an examination in this regard would seem scarcely necessary.

"In the case of the State v. Ross, 29 Mo. 38, the leading decision on the subject, it was held, that where a defendant was tried on an indictment for murder in the first degree and found guilty of a lesser grade of homicide and a new trial on his application granted, the verdict of the jury in the first trial was, by operation of law, an acquittal of murder in the first degree. Yet, that the prisoner might well be tried again, as well for the particular offense of which he had been found guilty as for any of the minor offenses, which, under our code of criminal procedure are embraced in an indictment for murder in the first degree, and that case (notwithstanding the very able dissenting opinion of Judge Scott, who held that when a party indicted for murder was found guilty of an inferior grade of that crime and obtained a new trial, that thereby the whole matter was opened for a re-examination regardless of any anterior proceedings had) in all subsequent adjudications of the point in controversy has been referred to as an unquestioned settlement of the law in that respect.

"It follows that the court should have promptly overruled the motion of defendant, as very clearly he was not entitled to a discharge, no matter what might have been the line of defense he designed pursuing at a subsequent trial. For this reason the judgment will be reversed and the cause remanded."

Decided July, 1873.

The Constitution of Missouri, adopted November 30, 1875, contains the following provisions:

"Sec. XXII. In criminal prosecution the accused shall have the right to appear and defend in person, and by counsel to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county.

"Sec. XXIII. That no person shall be compelled to testify against himself in a criminal cause; nor shall any person, after being once acquitted by a jury, be again, for the same offense, put in jeopardy of life or liberty; but if the jury to which the question of his guilt or innocence is submitted fail to render a verdict, the court before which the trial is had, may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the next term of court; or, if the state of business will permit, at the same term, and if judgment be arrested after a verdict of guilty on a defective indictment; or, if judgment on a verdict of guilty be reversed for error in law, nothing herein contained shall prevent a new trial of the prisoner, or a proper indictment, or according to correct principles of law."

The above provisions of the Constitution were construed by the Supreme Court of Missouri as follows in the case of the State v. Simms, 71 Mo. 538.

"As this cause will be remanded, it may be well to observe that Sec. 10 of Art. 13 of the Constitution of 1820, which provides that 'no person having been acquitted by a jury can for the same offense be again put in jeopardy of life and liberty,' and under which the case of the State v. Ross, *supra*, was decided, has been materially changed by Sec. 23, Art. 2, of the Constitution of 1875, by the addition to what has been copied, of the following words: 'And, if

judgment be arrested after verdict of guilty on a defective indictment; or, if judgment on a verdict of guilty be arrested for error in law, nothing herein contained shall prevent a new trial of the prisoner on a proper indictment, or according to correct principles of law.' The change thus made in the said section overthrows the rule laid down in the case of the State v. Ross, *supra*, that a person who is indicted for murder in the first degree, if tried for and convicted of murder in the second degree, which judgment is reversed for error in law, cannot, on a second trial, be tried for murder in the first degree. They are equivalent to declaring that when such judgment is reversed for error at law, the trial had is to be regarded as a mistrial, and that the cause when remanded is put on the same footing as a new trial, as if the cause had been submitted to a jury, resulting in a mistrial by the discharge of the jury in consequence of their inability to agree on a verdict. It is difficult to conceive what other construction can be given to the words added to said section."

Decided April term, 1880.

The statutes of Missouri in reference to murder are as follows:

Sec. 1. "Every murder which shall be committed by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary, or other felony shall be deemed murder in the first degree."

Sec. 2. "All other kinds of murder at common law, not herein declared to be manslaughter or justifiable or excusable homicide, shall be deemed murder in the second degree."

Sec. 3. "Persons convicted of murder in the first degree

shall suffer death; those convicted of murder in the second degree shall be punished by imprisonment in the penitentiary for not less than ten years.

Wagner's Statutes, vol. 1, pages 445 and 446.

Substantially the same provisions are found in the Revised Statutes of 1879, vol. 1, pages 218 and 219, sections 1232, 1233 and 1234.

"Upon indictment for any offense consisting of different degrees as prescribed by this law, the jury may find the accused not guilty of the offense charged in the indictment, and may find him guilty of any degree of such offense inferior to that charged in the indictment, or of an attempt to commit such an offense, or any degree thereof."

Wagner's Statutes, vol. 1, page 513, sec. 14.

Substantially the same provision is found in the Revision of 1879.

Rev. Stat. 1879, vol. 1, sec. 1654.

"When a defendant shall be acquitted or convicted upon any indictment for any offense consisting of different degrees as herein specified, he shall not thereafter be tried or convicted of a different degree of the same offense, nor for an attempt to commit the offense charged in the indictment, or any degree thereof; provided he could have been legally convicted of such degree of offense, or attempt to commit the same under the first indictment."

Wagner's Statutes, vol. 1, page 514, sec. 19.

Substantially the same provision is found in the Revised Statutes of 1879.

Rev. Stat. 1879, vol. 1, sec. 1656.

In all cases of final judgment rendered upon any indictment, an appeal to the Supreme Court shall be allowed the defendant, if applied for during the term at which such judgment is rendered.

Rev. Stat. 1879, vol. 1, sec. 1973.

The Rev. Stat. of Missouri of 1879 contains the following provisions in reference to a change of venue:

"Sec. 1856. Any criminal cause pending in any Circuit Court may be removed by the order of such court or the judge thereof, to the Circuit Court of another county in the same circuit, whenever it shall appear in the manner hereinafter provided, that the minds of the inhabitants of the county in which the cause is pending are so prejudiced against the defendant that a fair trial cannot be had therein.

"Sec. 1857, Whenever it shall appear in the manner hereinafter, that the inhabitants of the entire circuit are so prejudiced against the defendant that a fair trial cannot be had therein, the cause shall, by order of the court or the judge thereof, be removed to another circuit in which such prejudice is not alleged to exist.

"Sec. 1858. Such order of removal shall be made on the application of defendant," &c.

The special laws applicable to the county of St. Louis, now the city of St. Louis, provide as follows:

"Sec. 16. *Changes of venue for causes existing against judge.*—In all cases of change of venue from the Criminal Court of St. Louis county [city], applied for on account of the interest, prejudice or relationship of the judge of said

court, or on account of any other legal objection to said judge, the cause shall not be sent to a different county for trial, but shall be transferred to the Circuit Court of said county [city]; and upon the transcript of the record of such cause being filed in the office of the clerk of the court to which the same shall have been transferred, such court shall be possessed of full jurisdiction of the cause, and shall proceed to hear and determine the same." (G. S. 893, § 15.)

"Sec. 17. *Proceedings in Circuit Court on change of venue.*—In every case of change of venue to the court mentioned in the last preceding section, it shall be the duty of such court to have the same tried and disposed of as provided by law; and it shall, when necessary, hold special terms of said court to try and dispose of such causes, and shall have all the rights, powers and authority, and perform all the duties of the Criminal Court in relation to the same." (G. S. 894, § 16.)

"Sec. 18. *Change to other counties prohibited—special venire.*—It shall not be lawful for a person, indicted in St. Louis county [city], to obtain a change of venue to any other county; but if any person thus indicted shall file his petition, supported by the affidavit of himself, or some disinterested respectable person, stating that the minds of the inhabitants of the city of St. Louis are prejudiced against him, then a special *venire* shall be issued to summon a jury, consisting of persons who reside in St. Louis county, and outside of the city of St. Louis, to try said cause; and if any person thus indicted shall file a like petition and affidavit, as above, stating that the minds of the inhabitants of said county, who reside outside of the city of St. Louis, are prejudiced against him, then a *venire* shall issue in said cause, to summon a jury, consisting of persons who reside within the city of St. Louis to try the cause." (G. S. 894, § 17.)

"Sec. 19. *Only mode of procuring change.*—No change of venue shall hereafter be allowed from the St. Louis Criminal Court, except as hereinafter provided. Any party desiring a change of venue from said Criminal Court, on account of any of the causes provided by law, shall present his petition to the judge of the St. Louis Court of Common Pleas [Circuit Court], in writing, and verified by affidavit, and setting forth at least one of the causes for which changes of venue are now allowed by law, first giving reasonable notice to the adverse party; and thereupon the judge of said Common Pleas Court [Circuit Court] shall immediately hear such evidence as the parties may, respectively, introduce in regard to the statements made in said petition, and may examine the party applicant under oath; from all of which testimony said judge of said Court of Common Pleas [Circuit Court] shall determine the existence or non-existence of the facts stated in the petition; and if the said judge be of opinion that the facts set forth in said petition are true, he he shall state the same, in writing, and issue his warrant, directed to the judge and clerk of said Criminal Court, commanding them to transfer said cause to the St. Louis Circuit Court, as now required by law in similar cases; but if said judge of the Court of Common Pleas [Circuit Court] be of opinion that the matters stated in the said petition be untrue, he shall dismiss the application at the cost of the applicant.' (G. S. 895, §§ 1 and 2—*a*.)

Upon the record the following errors are assigned:

1st. The court erred in holding that § 22 of Article 2 of the Constitution of Missouri as applied to this case was not an *ex post facto* law, and in violation of the Constitution of the United States.

2d. The court erred in holding that § 18 of the Appendix of the Revised Statutes of Missouri, prohibiting a change of

venue from the city of St. Louis (a change of venue being allowable from all the counties of the State) was not in conflict with the Fourteenth Amendment of the Constitution of the United States.

BRIEF.

In Missouri one indicted for murder in the first degree, and convicted of murder in the second degree, could not, under the Constitution of 1820, as construed by the Supreme Court of the State, in the event of an appeal or reversal, be again tried for murder in the first degree; only for murder in the second degree or manslaughter.

The Constitution of 1865 contains the same provisions contained in the Constitution of 1820 in reference to this question.

Constitution of 1820 and 1865.
State vs. Ross.
State vs. Ball.
State vs. Smith.

Set out fully in the statement of laws.

Under the Constitution adopted in November, 1875, (after the offense for which plaintiff was indicted was committed) as construed by the Supreme Court of the State, one indicted for murder in the first degree, and convicted of murder in the second degree, may, in the event of appeal and a reversal, be again put on trial for murder in the first degree.

Constitution of 1875.
State vs. Sims.

Set out fully in statement.

Prior to the adoption of the Constitution of 1875, a conviction of murder in the second degree was an acquittal of murder in the first degree.

The main question in this case, as we contended in the application for the writ of error, and in the brief on the motion to dismiss for want of jurisdiction, is that Art. 2, § 23, of the Constitution of Missouri, as construed by the Supreme Court of the State and as applied to this case, is an *ex post facto* law, prohibited by the Constitution of the United States. Not a question of jeopardy, as supposed by the counsel for the State.

It may be contended, as it was in the brief on the motion to dismiss, and in the State courts, that a plea of guilty, regularly entered and regularly received by the court, with the consent of the prosecuting officer, is not equivalent to a conviction; but it has been so held in

State vs. Goldstein, 32 Cal. 32.
Shepperd vs. The People, 25 N. Y., 419.

It may be contended that by filing his motion to set aside the judgment on the plea of guilty, and asking to be allowed to plead not guilty and by taking an appeal, plaintiff waived his constitutional right.

The plaintiff was seeking relief from an erroneous judgment on his plea of guilty of murder in the second degree. "The waiver of the constitutional right implied in an application for a new trial is construed to extend only to the precise thing concerning which relief is sought." Bish. Crim. Law, vol. 1, § 1004.

Shepperd vs. The People, 25 N. Y., 406–418.
Slaughter vs. The State, 6 Humph., 413.

State vs. Hornsby, 5 Louis. Ann., 588.
Esmon vs. The State, 1 Swan, 15.
Jones vs. The State, 13 Tex., 184.
Hunt vs. The State, 25 Miss., 381.
Brennan *et al.* vs. The People, 15 Ills., 517.
State vs. Bull, 27 Mo., 327.

The Constitution of the United States prohibits not only the Legislature, but the State, from passing *ex post facto* laws, and the provision of the Constitution cannot be evaded by the form in which the power of the State is exerted.

Cummings vs. State, 4 Wall. 277.
Williams vs. Bruffy, 96 U. S., 176.

The substitution of death instead of imprisonment is, in the eye of the law, increasing or aggravating the punishment.

Dickenson vs. Dickenson, 3 Murph., 327.
Com. vs. Gardner, 77 Mass., 438.

To aggravate the punishment of a crime by a law posterior to its commission is forbidden by the same reason that restrains the Legislature from converting into a crime an act innocent when committed.

Dickenson vs. Dickenson, 3 Murph, 327.

Every law that changes the punishment and inflicts a greater punishment than the law annexes to the crime when committed is an *ex post facto* law.

Calder vs. Bull, 3 Dall., 386.
Walston vs. Conner, 16 B. Mon, 15.
State vs. Bond, 4 Jones, N. C., 9.

It is true the punishment for murder in the first and second decree is the same now as it was prior to the adoption of the Constitution of 1875. Yet the adoption of the Constitution of 1875 made it possible to punish plaintiff by death for an offense for which, under the old Constitution, he could be punished only by imprisonment. It *rendered* the offense punishable in different manner from what it was, when committed. It increased the punishment, and is an *ex post facto* law.

Fletcher vs. Peck, 6 Cranch, 138.

The Court of Appeals says, and the Supreme Court adopts that part of the opinion as its own, that "Formerly it was held in Missouri (State vs. Ross, 29 Mo. 32) that where a conviction is had of murder in the second degree on an indictment charging murder in the first degree, if this be set aside the defendant cannot again be tried for murder in the first degree. A change introduced by sec. 23, of art. 2, of the Constitution of 1875, has abrogated this rule. On the oral argument something was said by counsel for defendant to the effect that, under the old rule, defendant could not be put on trial for murder in the first degree, and that he could not be affected by the change of the constitutional provision, the crime having been committed whilst the old Constitution was in force. There is, however, nothing in this. The change is a change, not in crimes, but in criminal procedure, such changes are not *ex post facto*."

The courts proceed under the new Constitution precisely as they did under the old Constitution, and the change in the procedure spoken of by the State courts is probably in reference to the Sheriff and the Coroner.

Plaintiff had, under the old Constitution, a vested right.

"It is a doctrine extending through every department of

the law that rights, when vested in individuals, are unchangeable, while the remedies by which these rights are enforced may be varied from time to time, at the pleasure of the Legislature. Now, within this principle the absolute rights of prisoners, especially the constitutional ones, in respect of their defense, cannot be taken away."

Bishop on Crim. Pro., vol. 1, sec. 115.
Com. vs. Walton, 11 Allen, 238.

"Law divides itself into that which concerns the right, and that which concerns the remedy. Rights depend on the rule prevailing at the place where, and the time when, the fact transpired; remedies on that of the place where they are sought to be enforced, as existing at the time when the proceedings are carried on and the judgment is rendered."

Bishop Stat. Crimes, sec. 175.
May vs. Breed, 7 Cush. 15, 34.
Hale vs. State, 15 Conn., 242.
Love vs. The State, 4 Ala., 173.
The State vs. Fletcher, 4 R. I., 193.
Davidson vs. Wheeler, Morris, 238.
Knoup vs. Piqua Bank, 1 Ohio Stat., 603.

The question was raised in the St. Louis Criminal Court by objection and motion to sentence when the mandate of the Supreme Court was received and in the motion for a new trial, and in the motion in arrest, and the question was argued orally and in the briefs of the Court of Appeals and in the Supreme Court, and they held that § 22, Art. 2, of the Constitution of Missouri was not, as applied to this case, an *ex post facto* law, repugnant to the Constitution of the United States.

Is § 18 of the appendix of the Revised Statutes of Missouri, prohibiting a change of venue from the city of St. Louis, repugnant to the Fourteenth Amendment of the Constitution of the United States?

The confused statements in the opinion of the Supreme Court makes it difficult to understand precisely what was held by the court; but the record shows that the application was in proper form and supported by ample evidence, and that it was denied by the trial court because the special law applicable to St Louis prohibited a change of venue and the Supreme Court sustained the ruling of the trial court on this question.

If plaintiff had, under the special law, filed his petition in the Circuit Court, as the Supreme Court suggested he should have done, it would have availed him nothing, as that court, under the special laws, had no power to grant a change of venue, only to try the case before a jury from the city of St. Louis.

1. The general laws of Missouri provide for changes of venue, on proper showing, from any of the counties of the State, except the city of St. Louis, and a change of venue from said city is prohibited by the special law applicable alone to said city.

2. In the administration of the criminal law a change of venue to enable the prisoner to have a trial away from the prejudice of the people where the offense was committed, is in many cases his most valuable right, and a special law denying him this right seems to us to be in conflict with the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process

the law that rights, when vested in individuals, are unchangeable, while the remedies by which these rights are enforced may be varied from time to time, at the pleasure of the Legislature. Now, within this principle the absolute rights of prisoners, especially the constitutional ones, in respect of their defense, cannot be taken away."

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1. The general laws of Missouri provide for changes of venue, on proper showing, from any of the counties of the State, except the city of St. Louis, and a change of venue from said city is prohibited by the special law applicable alone to said city.

2. In the administration of the criminal law a change of venue to enable the prisoner to have a trial away from the prejudice of the people where the offense was committed, is in many cases his most valuable right, and a special law denying him this right seems to us to be in conflict with the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process

of law, nor deny to any person within its jurisdiction the equal protection of laws.

"The equality of the rights of citizens is a principle of republicanism. Every Republican Government is in duty bound to protect all its citizens in the enjoyment of this principle if within its power. The duty was originally assumed by the States, and it still remains there. The only obligation resting upon the United States is to see that the States do not deny that right."

2 Otto, 555 United States vs. Cruikshank.

The 14th Amendment to the Constitution was primarily intended to defend the rights of and protect the negro race; yet cases may arise where it will have a wider scope, and be more comprehensive in its operation.

Slaughter-house cases, 16 Wall., 36.

Partial or private laws which directly propose to destroy or affect individual rights, or accomplish the same thing by affording remedies leading to similar consequences, are unconstitutional and void.

Vanzunel vs. Waddell, 2 Yerg., 269; Mulley Hairs vs. Kennedy, 2 Yerg., 554; Budd vs. State, 3 Humph., 485; Reynolds vs. Baker, 6 Cald., 228.

In re Jilz, 3 Mo. App. 245.

This question was necessarily involved in the decision of the Supreme Court of Missouri, which could *not* have been rendered without considering it, and that is sufficient to give this court jurisdiction.

The plaintiff has been for more than eight years confined in the city jail, and for some time has been on the verge of

death, and, at his request, this case was advanced on the docket, and in the short time we have been unable to collect and examine the authorities bearing upon the questions involved, as carefully as we would have done had the case been called in the regular order.

But having sustained, by principle and precedent, the various propositions upon which the cause of plaintiff rests, we now leave the matter in the hands of the court, in full confidence that the judgment of the St. Louis Criminal Court, affirmed by the St. Louis Court of Appeals, and the Supreme Court of the State of Missouri, will be reversed.

L. D. SEWARD and
PRESLY N. JONES,
Counsel for Plaintiff.

OFFICE SUPREME COURT U. S.
FILED
OCT 25 1882
JAMES H. McKENNEY, CLERK

—IN THE—

Supreme Court of the United States

WASHINGTON, D. C.

THE STATE OF MISSOURI, DEFENDANT IN ERROR,

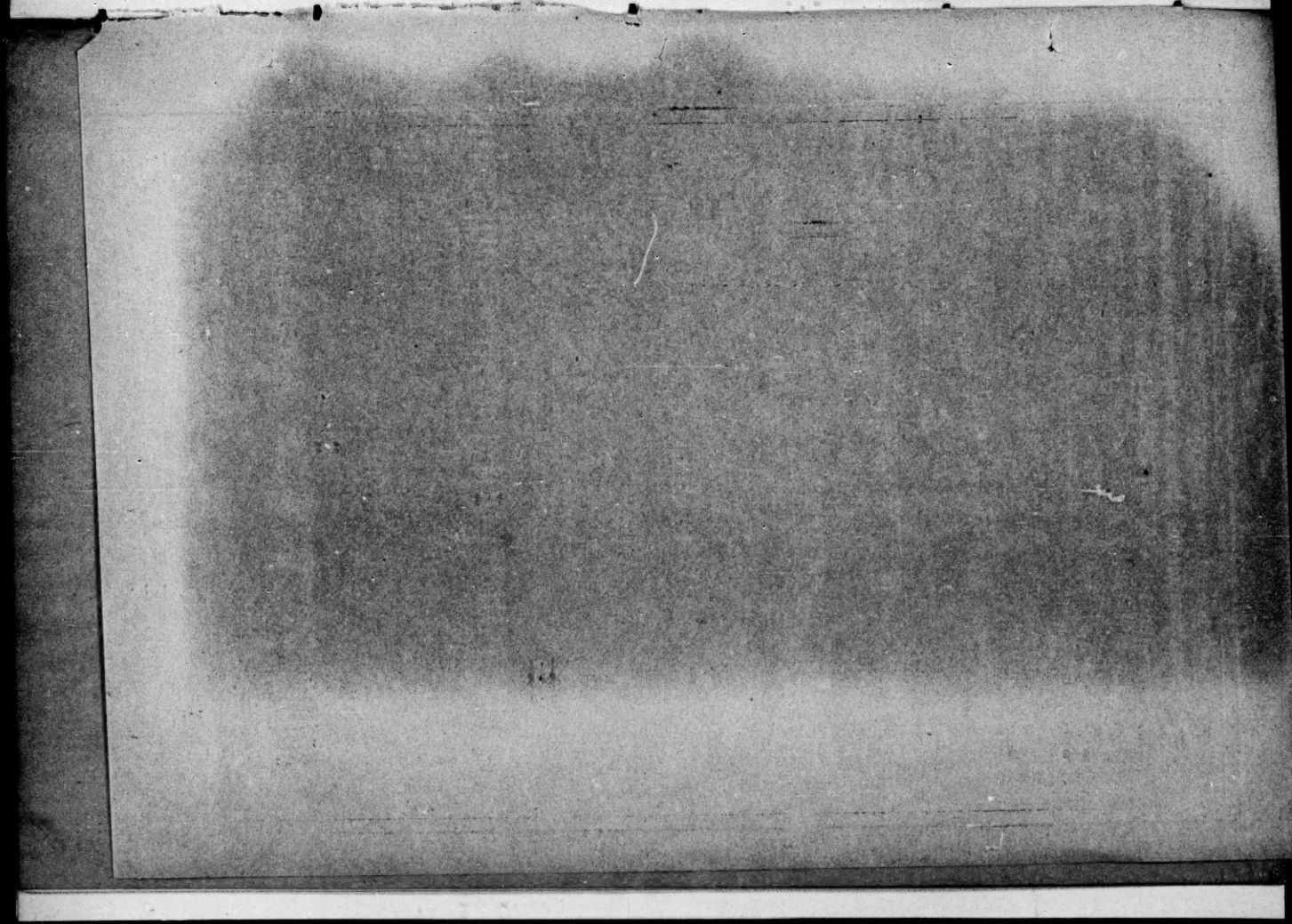
vs.

CHARLES F. KRING, PLAINTIFF IN ERROR.

MOTION TO DISMISS WRIT OF ERROR, AND BRIEF IN SUPPORT THEREOF.

D. H. McINTYRE, ATTORNEY GENERAL,
For Defendant in Error.

JEFFERSON CITY:
BURCH & FERGUSON, STATE BOOK AND JOB PRINTERS.
1882.



—IN THE—

Supreme Court of the United States,

OCTOBER TERM, 1882.

THE STATE OF MISSOURI,
vs. DEFENDANT IN ERROR,
CHARLES F. KRING,
PLAINTIFF IN ERROR.

Motion to dismiss Writ of Error.

Now comes the said defendant in error, by attorney, and moves the court to dismiss the writ granted and issued in the above entitled cause, and for reason therefor says that this court has no jurisdiction of said cause.

1st. Because the 23d Section of Article two, (2,) of the Constitution

of the State of Missouri, which took effect on the 30th day of November, 1875, which section is set out in full in the brief hereto attached in support of this motion, is not an *ex post facto* law, when applied to the case at bar.

2d. Because it appears from the record of the proceedings in said cause that no other question was involved in the trial thereof, that could confer jurisdiction on this court

D. H. McHenry

Attorney General,
For the Defendant in Error.

STATEMENT.

The plaintiff in error was indicted at the March term, 1875, of the St. Louis Criminal Court, for murder in the first degree. The indictment charges that on the 4th day of January, 1875, he shot one Dora Broemser, inflicting wounds from which she died on the 16th day of the same month and year. At the same term of the said court, he was arraigned, and entered a plea of not guilty. The cause was then continued from time to time, until the November term, 1875, when a trial was had resulting in a conviction of murder in the first degree. He was duly sentenced to be hanged on 24th of March, 1876; an appeal was taken to the St. Louis Court of Appeals, where the judgment of the Criminal Court was reversed. The Circuit Attorney for the State appealed from that judgment to the Supreme Court of the State, which affirmed the judgment of the said Court of Appeals, and remanded the cause for rehearing to the said Criminal Court. (64 Mo. Repts. 591.) He was again put upon his trial at the May term, 1878, but this was a mistrial, on account of the sickness of a juror, and the cause was continued. (Rec. p. 17.)

A third trial was had at the January term, 1879, when the jury failed to agree, and the cause was again continued. At the November term of the same year the plaintiff in error withdrew his plea of not guilty, and pleaded guilty to murder in the second degree, with an agreement, as he claimed, with the Circuit Attorney, that his sentence of confinement in the penitentiary should not be for a longer period than ten years. The court assessed his punishment at twenty-five years. (Rec. p. 27.)

The plaintiff in error moved to set aside this judgment, the court overruled his motion, whereupon he again appealed to the Court of Appeals, and that court affirmed the judgment of the Criminal Court, and the plaintiff in error again brought the cause to the Supreme Court. The judgment of the lower courts was reversed, and the cause a second time remanded to the said Criminal Court. (71 Mo. Repts., p. 551.)

At the July term, 1880, defendant refused to withdraw his plea of guilty to murder in the second degree; the court thereupon ordered that his motion, theretofore filed to that effect, be granted in obedience to the decision of the Supreme Court, and plaintiff in error, being arraigned, stood mute, refusing to plead; whereupon the court, upon motion of the Circuit Attorney, ordered the plea of not guilty to be entered, and the cause was continued by consent. (Rec. p. 32.)

At the November term, 1880, plaintiff in error made application for a change of venue from the St. Louis Criminal Court. (Rec. p. 51.) This application was overruled. (Rec. p. 57.)

Defendant then moved for a jury from St. Louis county, which was, by the court, overruled. (Rec. pp. 58-59.)

On the 11th of December, the court reconsidered this action and sustained the motion for a jury from St. Louis county. (Rec. pp. 59-63.)

Three hundred jurors were accordingly summoned from St. Louis county, to appear on the 15th of December, the time set for the trial. Two hundred and ninety appeared, whereupon the defendant challenged the array, and the court overruled the challenge. (Rec. pp. 64-65.) On the same day defendant made affidavit of prejudice against the judge of the Criminal Court, and asked for an order for the election of a special judge to try the cause.

At the March term, 1881, an order was made continuing the cause to the May term, and duly appointing the Hon. G. H. Burkhartt, Judge of the Second Judicial Circuit of the State of Missouri, to appear and try the cause on the 10th day of May, 1881. (Rec. pp, 134-135.)

The cause was called for trial on the day last aforesaid, in accordance with the order, Judge Burkhartt presiding, when the plaintiff in error moved to set aside the order of the court overruling his motion for a change of venue, and moved that the order appointing the said Burkhartt be set aside; also moved to transfer the cause to the Circuit Court of St. Louis county, moved to quash the indictment and to transfer the cause to the Circuit Court of St. Louis City. All of said motions were severally overruled. (Rec. pp. 136-137.)

Thereupon plaintiff in error filed a motion and affidavit for continuance. This motion was likewise overruled, and the trial proceeded.

The plaintiff in error was found guilty of murder in the first degree.

He moved for a new trial, and in arrest of judgment, these motions were overruled. He then appealed to the Court of Appeals, where the judgment of the Criminal Court was affirmed, from this judgment there was an appeal to the Supreme Court of the State, where the judgment of the Court of Appeals was affirmed at the October term, 1881, and the execution thereof ordered to take place on the 24th day of February, 1882. See 74 Mo. Repts., 612, 632. On the 9th of February, 1882, a writ of error to the Supreme Court of Missouri was granted by his honor, Sam'l F. Miller, at chambers, in the City of St. Louis, Missouri. This is substantially, but briefly, a history of the case, from the inception to the present time.

POINTS AND AUTHORITIES IN SUPPORT OF MOTION.

I.

The eighteenth and nineteenth sections of Article one of the Constitution of 1865, of the State of Missouri, in force at the time of the commission of the offence for which the plaintiff in error was tried, are as follows:

"Sec. XVIII. That in all criminal prosecutions the accused has the right to be heard by himself and his counsel; to demand the nature and cause of the accusation; to have compulsory process for witnesses in his favor; to meet the witnesses against him, face to face, and in prosecutions on presentment or indictment, to a speedy trial by an impartial jury of the vicinage; that the accused cannot be compelled to give evidence against himself, nor be deprived of life, liberty or property but by the judgment of his peers or the law of the land."

"Sec. XIX. That no person, after having been once acquitted by a jury, can, for the same offence, be again put in jeopardy of life or liberty; but if in any criminal prosecution, the jury be divided in opinion, the court before which the trial shall be had, may, in its discretion, discharge the jury, and commit or bail the accused for trial at the next term of said court."

In lieu of these provisions the Constitution of 1875, which took effect on the thirtieth day of November of that year, provided as follows:

"Sec. XXII. In criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to

have process to compel the attendance of witnesses in his behalf; and a speedy, public trial by an impartial jury of the county."

"Sec. XXIII. That no person shall be compelled to testify against himself in a criminal cause, nor shall any person after being once acquitted by a jury, be again, for the same offense, put in jeopardy of life or liberty; but if the jury to which the question of his guilt or innocence is submitted, fail to render a verdict, the court before which the trial is had, may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the next term of court, or if the state of business will permit, at the same term; and if judgment be arrested after a verdict of guilty on a defective indictment, or if judgment on a verdict of guilty be reversed for error in law, nothing herein contained shall prevent a new trial of the prisoner on a proper indictment, or according to correct principles of law."

II.

The Court of Appeals in their opinion affirming the judgment of the St. Louis criminal court, said, (Rec., p. 675): "Formerly it was held in Missouri, State vs. Ross, 29th Mo., 32, that where a conviction is had of murder in the second degree on an indictment charging murder in the first degree, if this be set aside, the defendant cannot again be tried for murder in the first degree. A change introduced by § 23 of Art. 2 of the Constitution of 1875, has abrogated this rule. On the oral argument something was said, by counsel for defendant, to the effect that under the old rule defendant could not be put on trial for murder in the first degree, and that he could not be affected by the change of the constitutional provision; the crime having been committed whilst the Constitution was in force. There is, however, nothing in this. The change is a change not in crimes, but in criminal proceedure, and such changes are not *ex post facto*. Cumming vs. Missouri, 4 Wall., 326; Gut vs. The State, 9 Wall., 35."

In reference to these points in the decision of the Court of Appeals. the Supreme Court of the State, affirming the said Court of Appeals said, 74 Mo. Reps., pp. 612, 631: "There is nothing in the point, that after an accepted plea of guilty of murder of the second degree, the defendant could not be put upon trial for murder of the first degree. We shall, on that proposition, accept what was said by the Court of Appeals in its opinion delivered in this cause."

III.

As to whether the plaintiff in error was twice put in jeopardy by being put on trial for murder in the first degree, after having pleaded guilty to

murder in the second degree, and been sentenced on said plea, it is submitted, that it is immaterial for the purpose of determining the question of the jurisdiction of this honorable court over this cause.

1st. Because the provision of the 5th article of the amendments to the Federal Constitution, to wit: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb," binds only the United States, and does not extend to the several States.

Bishop on Criminal Law, 5th Ed., Vol. 1, § 981.

Fox vs. The State of Ohio, 5th How., 434.

Barron vs. The Mayor and City Council of Baltimore, 7 Pet., 243, 250.

The United States vs. William C. Keen, 1st McLean, 437, 438.

United States vs. Gibert, 2 Sumner, 19, 48, 51, 52, 53.

Jackson vs. Wood, 2 Cow., 819, 820. (Note.)

Livingston vs. The Mayor of New York, 8th Wendell, 85, 100.

Colt vs. Eves, 12 Conn., 243, 251.

Barker vs. The People, 3 Cow., 710.

2d. Because, although the State Constitution has, and has ever had, a provision in reference to putting a person accused of crime twice in jeopardy for the same offense substantially the same as is contained in the United States Constitution, nevertheless, this question has been settled by the highest tribunal in the State, in the case of the State vs. Simms, 71 Mo., 538; State vs. Kring, 74 Mo., 612.

No jurisdiction then, it would seem, can obtain on this ground since in the first place, it is a matter which has been left to be regulated by the States themselves, in so far as it affects the citizen of a State on trial for an offense committed against the laws of the State. And since the decisions of the highest court in the State must be the rule of decision of this court under the provisions of the judiciary act.

United States vs. Morrison *et al.*, 4 Pet., 124.

Randall vs. Brigham, 7 Wall., 541.

Leffingwell vs. Warren, 2 Black, 599.

And many other cases, but citation of authorities on this point is wholly unnecessary.

IV.

But again, it is respectfully submitted, that the question of the jurisdiction of the court in this case is determined wholly by the consideration whether or not the 23d Sec. of the 2d Article of the Constitution of Missouri, is or is not, when applied to the case of the plaintiff in error, an *ex post facto* law; for unless it is so, this court has no jurisdiction.

An *ex post facto* law is defined by the great English Commentator thus: "When after an action (indifferent in itself) is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it."

Chitty's Blackstone, Vol. 1, p. 46.

These words have received judicial interpretation in this honorable court. "The prohibition, in the letter, is not to pass any law concerning, and after the fact; but the plain and obvious meaning and intention of the prohibition is this: that the Legislatures of the several States, shall not pass laws after a fact done by a subject or citizen, which shall have relation to such fact, and shall punish him for having done it. The prohibition considered in this light, is an additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts, having a retrospective operation. * * * * * * * * I will state what laws I consider *ex post facto* laws, within the *words* and the *intent* of the prohibition: 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime*, or makes it greater than it was, when committed. 3d. Every law that *changes* the punishment, and inflicts a *greater punishment* than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender."

Calder vs. Bull, 3d Dallas, 390. Also,

Fletcher vs. Peck, 6 Cranch, 138.

Carpenter vs. The Commonwealth of Penn., 17 How., 456.

Watson *et al.*, vs. Mercer, 8 Peters, 110.

Cummings vs. The State of Missouri, 4 Wall., pp. 277, 325.

V.

The Constitution of Missouri which took effect on the thirtieth day of November, 1875, differs in the 23d Sec. of the second Article from the 19th Sec. of Article 1 of the Constitution of 1865, by the addition of the following words: "And if judgment be arrested after a verdict of guilty on a defective indictment, or if judgment on a verdict of guilty be reversed for error in law, nothing herein contained shall prevent a new trial of the prisoner on a proper indictment, or according to correct principles of law." The Supreme Court of this State, in the State vs. Simms, 71 Mo., 538, referring to the new matter added to Sec. 23, *supra*, and the effect thereof upon the rule laid down in the State vs. Ross, 29 Mo., 32, said: "The change thus made in the said section overthrows the rule laid down in the case of the State vs. Ross, *supra*, that a person who is indicted for murder in the first degree, if tried and convicted of murder in the second degree, which judgment is reversed for error in law, cannot on a second trial be tried for murder in the first degree. They are equivalent to declaring that when such judgment is reversed for error at law, the trial had is to be regarded as a mis-trial, and that the cause when remanded is to be tried anew, and when remanded, that it is put on the same footing as to a new trial as if the cause had been submitted to a jury resulting in a mis-trial by the discharge of the jury in consequence of their inability to agree on a verdict. It is difficult to conceive what other construction can be given to the words added to said section." It may not be amiss to mention that the honorable judge who wrote this opinion, E. H. Norton, was a member of the Convention which framed the Constitution of 1875.

Upon what grounds can it be claimed that these added words come within the inhibition against passing *ex post facto laws*, as the same has been construed by this honorable court from its foundation to the present time? Of course there will be no pretence that by these words an act which was innocent when committed was afterward declared to be a crime, that the punishment was provided for after the act was done. Nor can it be said that the crime was by this constitutional provision aggravated, or made greater, or that it increased or affected the punishment, for by comparing section one of chapter two hundred of the General Statutes of 1865, in force when the act was committed, with Sec. 1232 of the Revised Statutes of 1879, in force since Nov. 1st, of the latter year, it will be observed that the two Statutes are, as to the crime with which the plaintiff in error was charged, viz.: willful, deliberate and premeditated murder, precisely the same.

And certainly it will not be contended that the words in question in any sense changed the legal rules of evidence so as to admit of the conviction of

the accused by less or by different evidence than was required, at the time of the commission of the offense, in order to convict.

But it may be contended that, but for the new provision contained in the said 23d Section of the Constitution of 1875, the plaintiff in error could not, at his last trial, have been put upon trial for murder in the first degree, and that the Court of Appeals in its opinion in the case said as much, and that the Supreme Court approved the same. This is not necessarily so, since if the majority of the court had entertained the same views as were so vigorously and tersely set forth in the able dissenting opinion of Judge Scott in the State vs. Ross, the rule would perhaps never have been established, and might have been overruled at any time had the Supreme Court seen proper so to do, without the aid of the said change in the Constitution. Be that as it may, the Court of Appeals expressed no approval of the doctrine of the Ross case in the case at bar, but only said: "Formerly it was held in Missouri, etc.," citing the case, (Record, p. 675), and the Supreme Court simply approved that opinion on this particular point, 74 Mo., *supra*. In the State vs. Simms, *supra*, the court expresses no opinion with reference to the correctness or otherwise of the Ross case, but merely say that, "the change thus made in the said section overthrows the rule." Thus it appears, whether by intention or not, both courts have failed to express any opinion in connection with the case of the plaintiff in error with reference to the Ross case, and much less have they said that but for the new matter in the new Constitution the plaintiff in error could not have been put on trial the last time for murder in the first degree.

VI.

The Court of Appeals said the change in the Constitution was a change not in crimes but in criminal procedure, and that such changes were not prohibited by the Federal Constitution, and cited Gut vs. The State, 9 Wall., 35, which holds, that a law changing the place of trial from one county to another county in the same district, or even to a different district from that in which the offense was committed, or the indictment found, is not an *ex post facto* law, though passed subsequent to the commission of the offense or the finding of the indictment. And again it is said, Cooley's Constitutional Limitations, § 272, 3d Ed.: "A law giving the government additional challenges, and another which authorized the amendment of indictments, have both been sustained as applicable to past transactions, as any similar law, tending only to *improve the remedy*, but working no injustice to the defendant, and depriving him of no substantial right, doubtless would be." Can it be said that the plaintiff in error has been by the change in the constitutional

law deprived of any substantial right? He had pleaded guilty to murder in the second degree, and when the judgment and sentence were rendered thereon, appealed from the same and asked for a new trial, asked to be allowed to withdraw his plea of "guilty of murder in the second degree heretofore entered," and that he be permitted to have his original plea of not guilty entered of record, "*to the end that he may have a trial upon the merits of the case before a jury.*" (Rec., p. 37). His request was granted, and he was again put upon trial for murder in the first degree, and found guilty. In all this, was his offense aggravated, or made worse than when it was first committed? He was only held to stand for trial as if he had not been formerly put upon trial at all. And it may here be added that the case at bar differs from the cases which are said to have established the rule, hereinbefore referred to, viz.: The State vs. Ball, 27 Mo., 324; *Id.* vs. Ross, 29 Mo., 32; *Id.* vs. Smith, 53 Mo., 139; in this respect, that the former was a plea of guilty of murder in the second degree upon an alleged agreement as to what the sentence should be, whereas in each of the latter cases there was a verdict of guilty of murder in the second degree upon a charge of murder in the first degree.

Of an act passed by the General Assembly of the State of Missouri, entitled "An act to prevent the discharge of persons by the *habeas corpus* act, who have been convicted of crime and erroneously sentenced," approved March 1st, 1877, Session Acts, p. 261. The Supreme Court said: "By the terms of the act, it relates to sentences which had been pronounced when it was enacted, as well as to those thereafter to be pronounced, * * * * * it is not an *ex post facto* law, as that expression had been explained by the law writers, and in numerous adjudged cases before our Constitution was adopted." *Exparte* Bethurum, 66 Mo. Reps., pp. 544, 549.

For these considerations, it is most respectfully submitted that this honorable court has no jurisdiction of the case at bar, and that the motion of the defendant in error shonld be sustained, and the writ dismissed.

D. H. McINTYRE,
Attorney-General, for Defendant in Error.